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In re)	
DISTRIBUTION OF SATELLITE)	CONSOLIDATED PROCEEDING
ROYALTY FUNDS)	NO. 14-CRB-0011-SD (2010-13)
)	
)	
)	

**(Daniel M. Hartman, Allan Singer, and
Nancy A. Mathiowetz, Ph.D.)**

**Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

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<i>In re</i>)	
)	
DISTRIBUTION OF CABLE)	NO. 14-CRB-0010-CD (2010-13)
ROYALTY FUNDS)	
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Written Direct Testimony of

Daniel M. Hartman

December 22, 2016

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I. QUALIFICATIONS

1. I have nearly twenty years of experience in the satellite television business as an executive responsible for the valuation and acquisition of television programming, including fifteen years in that capacity at DIRECTV, the nation's largest satellite television provider. I am currently President of Hartman Media Consultants, providing consulting services for various media clients, including cable television networks, program distributors and investors in television programming distribution.

2. I started my career in October of 1989 as a corporate attorney at O'Melveny & Myers in Los Angeles, CA. In February of 1995, I accepted a position as Senior Counsel, Legal Affairs for Fox Broadcasting Company where I served as lead attorney for the Fox Sports group. I also served as legal counsel for the Fox broadcast television network.

3. In February 1998, I took a position as Assistant General Counsel, Business and Legal Affairs at DIRECTV, where I spent two years negotiating agreements for carriage of programming on DIRECTV. In April of 2000, I moved to the Programming Acquisitions department at DIRECTV and became Senior Director, serving in a strictly business role. I remained at DIRECTV until January 2013, having been promoted to Senior Vice President of Programming Acquisitions in 2007. In that capacity, I was responsible for DIRECTV's program acquisition activities with respect to all general entertainment and premium cable networks, as well as initiatives such as video-on-demand programming and the development of DIRECTV's "TV Everywhere" platform. My responsibilities included negotiating the terms of carriage for that programming. They also included overseeing sports programming negotiations as well as the strategy and negotiations with respect to local broadcast station groups.

4. During my tenure at DIRECTV, I served as a Board member of The Tennis Channel from 2007 through 2012 where my duties included providing guidance on distribution and channel strategy matters. In addition, since 2008 I have served as a Board member of the Los Angeles Sports Council and the Southern California Committee for the Olympic Games.

5. At DIRECTV I worked regularly with the CEO and other senior executives as lead strategist with respect to pricing and packaging of content as well as budgeting and forecasting of programming costs. I was closely involved in the selection of channels for DIRECTV (including distant signal programming). This selection of channels to launch (and, subsequently, whether to maintain them on the platform) involved an in-depth cost/benefit analysis. Throughout my tenure at DIRECTV, I negotiated hundreds of programming distribution agreements covering all types of content, including retransmission consent agreements for broadcast television station carriage. During the period covering 2010-2013, I also negotiated an agreement for the rights to continue receiving the satellite signal of WGN. Thus, I gained insight into the variety of programming available to multichannel video programming distributors (“MVPDs”) and the rationale for carriage. My responsibilities required me to be familiar with the types of programming being offered by DIRECTV’s competition as well as the value of, and fair market price for, that programming.

6. I have attached a copy of my resume as Appendix A.

II. INTRODUCTION AND SUMMARY

7. I understand that this proceeding involves the distribution of the compulsory licensing royalties paid by cable operators to retransmit non-network programming on distant signals during the years 2010, 2011, 2012 and 2013. I further understand that the goal in distributing these royalties among the copyright owners of the programming is to allocate the royalties so that each group of copyright owners receives, as a percentage share, what it would have received in an open market absent any compulsory license.

8. Although the technology utilized by cable and satellite distributors may differ, these distributors share similarities, particularly when it comes to the product they sell: television programming. Both satellite and cable companies compete for paying customers. Monthly subscriber fees from these customers are by far the most significant source of revenue for MVPDs, and attracting and maintaining these subscribers is necessarily the lifeblood of MVPDs. Thus, the selection of programming offered to customers is of tantamount importance to all

MVPDs, including cable and satellite. Both cable operators and satellite providers value programming in essentially the same way.

9. At the request of the Joint Sports Claimants (“JSC”), I have reviewed the report entitled “Cable Operator Valuation of Distant Signal Non-Network Programming: 2010-2013” (“Bortz Survey”) prepared by Bortz Media & Sports Group, Inc. (“Bortz Group”). The Bortz Group conducts this survey of the cable industry each year in order to determine what cable systems would have paid, on a relative basis, for the different types of non-network programming on the distant signals, had those systems been required to negotiate in an open market absent compulsory licensing. The Bortz Survey studies cable systems, and, while there are some differences between the distant signals carried under the Section 111 cable statutory license and the Section 119 satellite statutory license (discussed more fully below), the overall distant signal programming is similar. In the period covered by this proceeding, the years 2010-2013, the predominant distant signal distributed by both satellite providers and cable systems was the superstation WGN.

10. The results of the Bortz Survey show that for the period from 2010-2013, cable operators valued live professional and college team sports programming on the distant signals they carried more highly than any other distant signal non-network programming category. In my opinion, the 2010-2013 Bortz Survey results provide a reasonable estimate of the relative values cable operators and other MVPDs would assign to the various categories of non-network distant signal programming addressed in those cable operator surveys.

III. MVPDs AND DISTANT SIGNAL PROGRAMMING

11. Traditional cable television is generally delivered from a headend via coaxial or fiber-optic cables into the home. Satellite television is delivered via satellite transmission to a satellite dish (generally affixed to the rooftop of a residential dwelling) and a wired connection into that dwelling. While the infrastructure for delivery may be different, the business model for each is very similar. Both rely predominantly on subscriber fees from their customers to generate revenue. There are other sources of ancillary revenue, such as fees generated from the

lease or sale of set top boxes and revenue generated from advertising time allocated to them by channels they distribute. (Note that MVPDs are not permitted to insert or sell advertising on distant signals carried pursuant to the Section 111 or 119 statutory license.) However, subscriber fees make up the vast majority of MVPD revenues.

12. Both cable and satellite companies make secondary transmissions of out-of-market distant broadcast signals. While these signals may vary depending on whether they are licensed via Section 111 or Section 119, in 2010-13 WGN was a constant across cable and satellite distributors. WGN was by far the most widely carried distant signal by cable operators during the 2010-2013 period: approximately three-fourths of the “Form 3” cable systems that retransmitted distant signals during that period retransmitted WGN as a distant signal (available to more than 41 million subscribers). By comparison, the next most widely carried distant signals were available on a distant basis to fewer than 1.2 million subscribers. Further, WGN alone accounted for more than three-fourths of the total fees generated by signals carried on a distant basis by cable operators during the 2010-2013 period.

13. The predominance of WGN was similar on the satellite side. Based on royalty statements of account filed by satellite carriers, WGN accounted for 61% to 79% of the total Section 119 royalty fees paid by DISH during the 2010-2013 period, depending on the year. For DIRECTV that number ranged from 72% to 79%.

14. There are some differences between satellite carriers and cable systems when it comes to compulsory licensing for distant television signals. On the cable side, only non-network distant signal programming is compensable for royalty distribution purposes (all programming on Fox stations is considered non-network programming). On the satellite side, both network and non-network programming is compensable. In addition, cable systems pay statutory royalties to carry distant public television stations and Canadian television stations; satellite carriers do not.

15. Satellite distributors pay a per-subscriber statutory royalty fee to retransmit distant network and non-network signals. However, a distant network signal may be offered only in a

geographic area that is “unserved” by a local over-the-air station (or stations) affiliated with the same network. Because so many local television markets in the United States are “served” by local network stations, in 2010-13 the number of distant network satellite subscribers was much smaller than the number of distant independent signal subscribers (principally WGN). During the 2010-2013 period, approximately 23% of DIRECTV’s Section 119 royalties were paid for distribution of distant network signals (the comparable percentage for DISH was less than 3%).

16. These differences in the signals for which cable and satellite services pay, however, do not alter the fundamental fact that these services compete with each other for essentially the same universe of customers for the same product: multichannel video programming. Attracting and retaining customers is the lifeblood of the MVPD business, and the number and types of channels an MVPD offers is key to that strategy. Thus, programming deemed valuable or “must have” to a satellite provider (e.g., “tune in” programming, time-shift resistant programming, marquee programming), would be valued the same by a cable provider. Live sporting events are the prime example of this type of programming.

IV. VALUE OF SPORTS PROGRAMMING TO MVPDs

17. As set forth in Table I-1 below, the Bortz Survey found that in each of the years 2010, 2011, 2012 and 2013, cable operators valued the live professional and college team sports programming on the distant signals they carried more highly than any other distant signal non-network programming category:

Table I-1.
Distant Signal Programming Valuation Studies, 2010-13

	2010	2011	2012	2013	2010-13 Average
Live professional and college team sports	40.9%	36.4%	37.9%	37.7%	38.2%
News and public affairs programs	18.7%	18.3%	22.8%	22.7%	20.6%
Movies	15.9%	18.6%	15.3%	15.5%	16.3%
Syndicated shows, series and specials	16.0%	17.4%	13.5%	11.8%	14.7%
PBS and all other programming on non-commercial signals	4.4%	4.7%	5.1%	6.2%	5.1%
Devotional and religious programming	4.0%	4.5%	4.8%	5.0%	4.6%
All programming on Canadian signals	<u>0.1%</u>	<u>0.2%</u>	<u>0.6%</u>	<u>1.2%</u>	<u>0.5%</u>
Total*	100.0%	100.0%	100.0%	100.0%	100.0%

*Columns may not add to total due to rounding.

18. The high relative value that the Bortz Survey accords to live professional and collegiate team sports programming (approximately 38%) is consistent with my experience in the MVPD industry, including during the years 2010 through 2013.

19. As noted above, subscriber fees account for the great majority of MVPD revenue, and, thus, operators live and die by these numbers. The key to gaining and maintaining subscribers is the programming offered (along with its associated price point). The key determinant of value, then, of any particular type of programming to an MVPD is the value of such programming for purposes of maximizing subscriber growth and minimizing subscriber loss. In the ever-increasing competitive MVPD space, any edge makes a difference.

20. Sports programming is unique and, in my experience in the MVPD business, the most valuable category of programming on cable and satellite platforms. Live sports programming is a “one-of-a-kind” experience that subscribers want to watch in real time. Sports programming, unlike most other programming, is resistant to time shifting. Results from live sporting events are available from multiple sources as these events are unfolding; any delay in watching can thus spoil the results for a fan.

21. Live sports is one of the few key pieces of programming that distinguishes MVPDs from other aggregators/distributors of programming. Sports fans are incredibly passionate about their teams and will schedule their days around when a particular game is airing. MVPDs must offer this programming (and offer it live) if they are going to compete for pay television subscribers, and availability of this programming is often highlighted in marketing materials as a selling point to prospective customers. If a particular MVPD does not carry (or ceases carriage of) a channel carrying live sports, the customer reaction is quick and severe. Loss of subscribers (possibly significant) can be assured.

22. An MVPD would carry a distant signal only if the programming on that signal makes carriage worthwhile. MVPDs cannot insert advertising on a distant signal, nor can they alter the signal in other ways that they might with other channels (e.g., overlays of information,

interactive elements with revenue opportunities). Live sports programming is the most important programming to an MVPD in deciding whether to launch (and continue to carry) a distant signal. Live sports programming serves as a differentiator for distant signals, and a distant signal is much more attractive if it carries sports programming not otherwise available. A good example of this is the availability of Chicago Cubs games on WGN. Cubs fans are everywhere, and WGN's carriage of Cubs games in 2010-13 made it a "must have" for many MVPDs.

23. As noted above, WGN was the main independent distant signal distributed by DIRECTV during the years 2010-2013, accounting for approximately three quarters of DIRECTV's Section 119 royalties in those years. In 2010-13, WGN's sports programming, which included Major League Baseball telecasts of the Cubs and White Sox as well as National Basketball Association telecasts of the Chicago Bulls, was by far the most valuable programming that WGN offered to MVPDs. Because this programming is popular across the country, carrying WGN increased customer satisfaction and thereby provided great value to an MVPD's line-up. The availability of sports programming on WGN factored heavily in DIRECTV's decision to carry it as a distant signal.

24. I have reviewed the written testimony in the 2004-05 proceeding of Judith Meyka, consultant and former Senior Vice President of Programming for Adelphia Communications. JSC Ex. 11. She testified as to the importance of live sports programming to a cable operator's programming lineup. Unlike other types of programming, it is "one-of-a-kind;" you cannot substitute one game for another, one team for another or one sport for another. I agree with Ms. Meyka's testimony. Sports fans are very passionate and will not hesitate to quickly switch video providers if their particular team is not available on their current provider. MVPDs are loath to drop a channel with live sports programming knowing this. Further, a fan may choose not to subscribe to a provider's service if a particular channel carrying his or her team is not available. Hence, MVPDs generally launch a new channel carrying live sports once one of their competitors launches that channel. The competition in the MVPD space is stiff and live sports is very important to attracting and retaining subscribers.

25. Other industry executives similarly have testified in prior proceedings as to why MVPDs value sports programming so highly. I agree with those witnesses that live sports programming has great and unique value to cable operators. The cable and satellite television business has certainly changed since this testimony was given but these statements still remain true today, probably even more so. Fans are passionate about their team(s), and channels that carry these teams are the most important to a cable operator. There is no substitution for this product. On the other hand, movies and syndicated programming, because of their nature and wide availability from a variety of sources, typically do not generate the type of interest that causes customers to become or remain cable subscribers. Subscribers are less likely to switch providers if a cable operator drops a distant signal carrying non-sports programming.

26. This applies equally to the satellite side. Live sports programming is just as important to satellite distributors. In fact, DIRECTV has consistently used sports programming to differentiate itself from its competitors as a means to gain and keep subscribers.

27. The MVPD industry is incredibly competitive and has only become more so in the last decade or so. During the 2010-2013 period at issue, MVPDs were competing not only amongst themselves, but also with formidable competitors such as Netflix, Hulu, Amazon and Apple TV. Subscription television is a saturated market, and one of the very few genres of programming that make MVPDs stand out is live sports. The fact that there are many other sources of non-sports programming (e.g., movies, sitcoms, dramas) has made this type of programming increasingly fungible, and by 2010-13 the availability of such programming also had increased significantly on platforms outside of traditional MVPDs.

28. In contexts where the compulsory license does not apply, prices for live sports rights programming paid by distributors is set via marketplace negotiations. It is no secret that sports rights costs have been increasing for years. In fact, several years ago, DIRECTV began adding a “Regional Sports Fee” surcharge on its customers’ bills in certain regions of the country as a way to recoup the rising costs of sports programming on non-broadcast cable networks. Other MVPDs followed.

29. During 2010-13 the average per channel cost for channels containing sports far outweighed the average cost per channels devoted to non-sports programming. During that time period, channels containing sports programming accounted for well over 40% of programming costs to an MVPD even though a much smaller percentage of subscribers were regular watchers of such channels. MVPDs are forced to pay higher and higher fees for sports programming because they must serve their subscriber base which contains very vocal and very passionate fans. This is a testament to the power of sports.

30. During my tenure at DIRECTV, I witnessed the market in action. During the period from 2006-2013 the annual increases for channels containing sports increased at higher percentages than entertainment or other channels. A big reason for these increases is directly tied to the channels' greatly escalating costs to acquire this programming. The costs of professional and college games far outpaced the costs of general entertainment programming.

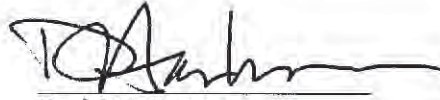
31. The power of sports can also be seen in the proliferation of sports networks coming to market in the last 15 years. Each of the professional sports leagues launched a standalone channel (e.g., NFL Network, MLB Network, NBA TV), and more than a few professional teams broke away from the channel they were broadcast on at the time to form their own channel (e.g., Yankees, Mets, Lakers). Certain college conferences have followed suit (e.g., Big 10, SEC). MVPDs were forced to carry these channels at additional (often significant) costs in order to compete. This does not happen with non-sports programming.

32. The proliferation of options for watching non-sports programming has only increased the value of live sports to an MVPD. The period covering 2010-2013 saw the launch (or continued growth) of non-traditional ways of watching content. Services like Netflix, Amazon and Hulu provide a plethora of entertainment-based programming that can easily fulfill the needs of a non-sports fan. In addition, technology allowed for viewing content on a time-shifted basis (including some viewing out-of-home). Thus, live sports became even more important to MVPDs as a way to gain/maintain their subscriber base.

Public Version

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 20, 2016

A handwritten signature in black ink, appearing to read "D. Hartman", written over a horizontal line.

Daniel M. Hartman

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EXPERIENCE

President | Hartman Media Consultants

Manhattan Beach, CA 2013-Present

Provide strategic advice to a variety of traditional and new media companies with respect to content acquisition and distribution.

Senior Vice President, Programming Acquisitions | DIRECTV, Inc.

El Segundo, CA 1998-2013

Responsible for program acquisition activities for DIRECTV with respect to all general entertainment, sports and premium networks as well as local broadcast stations. Negotiated carriage agreements for, and maintained day-to-day relationships with, all new and existing networks. Worked regularly with EVPs of Content and Marketing and CEO as lead strategist with respect to pricing and packaging of content as well as budgeting and forecasting of programming costs.

Senior Counsel, Legal Affairs | Fox Broadcasting Company/Fox Sports

Los Angeles, CA 1995-1998

Served as chief in-house counsel for Fox Sports, duties for which included negotiating and drafting documentation relating to sports rights acquisitions as well as all above-the-line personnel. Served as primary attorney for Fox Sports Marketing and Fox Sports Online. Also served as counsel for Fox Broadcasting Company, negotiating pilot/series agreements, production services agreements, content license agreements.

Corporate Attorney | O'Melveny & Myers

Los Angeles, CA 1989-1995

Drafted and negotiated documentation with respect to a variety of corporate and lending transactions.

EDUCATION

George Washington University Law Center

J.D., with honors, May 1989

Trustee Scholar

The Pennsylvania State University

B.A., with Honors, May 1985 | Communications, Business Minor

Graduate of Schreyer Honors College; Presidential Medal of Achievement Recipient

BOARDS

The Tennis Channel: 2007 - 2012

Los Angeles Sports Council/Southern California Committee for the Olympic Games:
2008-Present

Penn State College of Communications Advancement Council: 2014-Present

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

DISTRIBUTION OF CABLE
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Written Rebuttal Testimony of

Daniel M. Hartman

September 15, 2017

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I. QUALIFICATIONS

1. I am president of Hartman Media Consultants, providing consulting services for various media clients, including cable television networks, program distributors and investors in television programming distribution. I have nearly twenty years of experience in the satellite television business as an executive responsible for the valuation and acquisition of television programming, including fifteen years in that capacity at DIRECTV, the nation's largest satellite television provider. I have also served as a board member of The Tennis Channel, where I provided guidance on distribution and channel strategy matters, and as Senior Counsel, Legal Affairs, at Fox Broadcasting Company.

2. During my tenure at DIRECTV I worked regularly with the CEO and other senior executives as lead strategist with respect to pricing and packaging of content as well as budgeting and forecasting of programming costs. I was closely involved in the selection of channels for DIRECTV (including distant signal programming). Throughout my tenure at DIRECTV, I negotiated hundreds of programming distribution agreements covering all types of content, including retransmission consent agreements for broadcast television station carriage. During the period covering 2010-2013, I also negotiated an agreement for the rights to continue receiving the satellite signal of WGN America ("WGNA"). Thus, I gained insight into the variety of programming available to multichannel video programming distributors ("MVPDs") and the rationale for carriage. My responsibilities required me to be familiar with the types of programming being offered by DIRECTV's competition as well as the value of, and fair market price for, that programming.

3. My background and qualifications are described more fully in Appendix A to my Written Direct Testimony dated December 22, 2016, submitted to the Copyright Royalty Judges ("Judges") on behalf of the Joint Sports Claimants ("JSC").

II. INTRODUCTION AND SUMMARY

4. My December 22, 2016 Written Direct Testimony explains that the relative valuations reflected in the 2010-13 cable operator surveys by Bortz Media & Sports Group, Inc. (“Bortz surveys”) comport with my experience and knowledge in the industry; that live professional and college team sports programming (“Sports programming”) on distant signals is particularly important to multichannel video programming distributors (“MVPDs”); and that the relative value of Sports programming exceeds that of other types of programming, as reflected in the Bortz surveys.

5. In this rebuttal testimony I address assertions concerning the relative value of Sports programming and the 2010-13 Bortz surveys in the written direct testimony submitted on behalf of Program Suppliers by John Mansell, Sue Ann R. Hamilton, and Dr. Joel Steckel. Nothing in the testimony of those witnesses provides any basis for valuing Sports programming less than the Bortz surveys show.

6. As discussed below, Mr. Mansell is incorrect to suggest that Sport programming on distant signals had a lower relative value in 2010-13 than in prior years; to the contrary, the relative value of Sports programming has increased over time, as it has been more resistant to the changing media environment than other, non-live types of programming. Ms. Hamilton’s assertion that WGNA was carried primarily for reasons unrelated to its value to MVPDs is unsupported and contrary my experience in the industry, including my negotiations for the continued carriage of WGNA during the time period at issue. WGNA, and in particular its Sports programming, provided a good value proposition to MVPDs. Ms. Hamilton also mischaracterizes the significance of viewership in assessing value; as marketplace prices confirm, viewership is not a reliable measure of value. I also disagree with Ms. Hamilton’s claim that respondents would be confused by the program categories in the Bortz survey. Those

categories are clear to programming professionals and correspond with common industry understandings — e.g., that live professional and college team sports events are a distinct and uniquely valuable type of programming. Finally, Dr. Steckel is wrong to suggest that the Bortz survey required respondents to grapple with “unfamiliar constructs”; the survey respondents were executives with principal responsibility for programming decisions at their systems and as such are well-versed in assessing the relative value of various types of programming.

III. MR. MANSELL’S TESTIMONY CONFIRMS THE HIGH VALUE OF SPORTS RELATIVE TO OTHER TYPES OF DISTANT SIGNAL PROGRAMMING

7. The stated purpose of Mr. Mansell’s testimony is to “analyze the changes” in the carriage of Sports programming “in light of distribution and technology options that evolved through 2013 to compete for the attention of the consumer” of that programming.¹ Mr. Mansell’s testimony does not support according a lower relative value for Sports programming in 2010-13 than in 2004-05, the period at issue in the Judges’ most recent litigated allocation of royalties. To the contrary, his testimony confirms the high value of Sports programming relative to other types of distant signal programming.

A. Mr. Mansell’s Data Reflects that Sports Programming was Highly Valued by MVPDs in 2010-13

8. Mr. Mansell describes the growth of new outlets for Sports programming such as regional sports networks (“RSNs”).² However, he ignores that this growth reflects and was driven by the high value of Sports programming to cable system operators (“CSOs”) and other MVPDs relative to other types of programming. The same factors that make Sports programming especially valuable when carried on RSNs and other cable networks — it is

¹ Amended Written Direct Testimony of John Mansell (“Mansell Amended Testimony”), at 3 (Mar. 9, 2017).

² *Id.* at 8–11.

unique, live “must have” programming — likewise make Sports programming the most valuable type of programming on distant signals.

9. Other elements of Mr. Mansell’s report provide a similarly strong indicator of the high value MVPDs accord to this type of programming. For example, Mr. Mansell notes that RSNs often lock up Sports programming by paying “very high rights fees in exchange for exclusive and long term agreements.”³ He states that by 2010, RSNs were generating an estimated \$4.2 billion in affiliate fees — an increase of approximately \$1.7 billion, or 68%, from 2005 — and were rising at a 10.4% compound annual growth rate.⁴ That number is higher than the compound annual growth rate for non-sports networks. In 2013 SNL Kagan reported that sports fees paid by cable, satellite and telco companies were on pace to increase 12% in 2013, double the rate for non-sports programming.⁵

10. The high costs that MVPDs paid for Sports programming reflects the great value of that programming to their systems. Based on my experience in the MVPD industry, the value of RSNs to MVPDs flows almost entirely from their carriage of live professional and college team games, and not the other programming on those networks. Similarly, the live sports programming on ESPN is the most valuable programming to MVPDs (and their subscribers). Live professional and college games were “must have” programming for MVPDs. These games offer a “one of a kind” experience that fans want to watch in real time, before the results are known (which would spoil the experience).

³ *Id.* at 10.

⁴ *Id.* at 9.

⁵ See Spangler, Todd “Sports Fans: Get Ready to Spend More Money to Watch Your Favorite Teams,” *Variety* (Aug. 13, 2013), <http://variety.com/2013/tv/news/sports-fans-to-spend-more-money-to-watch-favorite-teams-1200577215/>.

11. These same attributes apply to Sports programming on distant signals, and as an MVPD executive I considered Sports to be the most valuable type of content on the distant signals carried by DIRECTV in 2010-13.

B. The Relative Amount of Sports Carriage on Distant Signals in 2010-13 was Comparable to Such Carriage in 2004-05

12. Mr. Mansell’s testimony discusses changing carriage patterns for Sports programming. But Mr. Mansell fails to compare those patterns with the carriage patterns of the other types of programming at issue in this proceeding. Data on all of that programming indicates that the relative amount of compensable Sports programming carried on distant signals did not decline in 2010-13 as compared with 2004-05. Indeed, according to data presented by experts for the Commercial Television claimants (“CTV”), Sports programming had a higher share of compensable retransmissions in 2010-13 than in 2004-05, as set forth in Table 5 of the Written Rebuttal Testimony of Dr. Mark A. Israel (“Israel Rebuttal Testimony”) (Sept. 15, 2017):

Table 1: Share of Compensable Minutes by Claimant Group Weighted by Subscribers

	2004-2005	2010-2013
Claimant Group	Ducey	Crawford
Sports	4.5%	5.9%
Program Suppliers	50.1%	33.3%
CTV	15.5%	15.6%
PTV	22.3%	36.3%
Devotional	2.7%	2.3%
Canadian	4.5%	6.6%
Total	100.00%	100.00%

Source: Crawford Corrected Testimony, April 11, 2017, Figure 12.

Ducey Testimony, June 1, 2009, Exhibit 8.

13. Further, the compensable Sports carriage on the predominant distant signal WGNA — and on FOX distant signals, which are compensable under the statutory license — in 2010-13 was comparable to such carriage in 2004-05. In contrast, the amount of compensable

Program Suppliers programming on WGNA was sharply lower in 2010-13 as compared with 2004-05.⁶

14. The carriage of live MLB and NBA games broadcast on WGNA during the 2004-05 and 2010-13 periods is set forth in Table III-1 below.⁷

Table III-1. JSC Telecasts on WGNA in 2004-05 and 2010-13

	2004	2005		2010	2011	2012	2013
Cubs	65	70		68	66	71	72
White Sox	29	29		33	31	32	29
Bulls	<u>13</u>	<u>14</u>		<u>16</u>	<u>12</u>	<u>18</u>	<u>15</u>
TOTAL	107	113		117	109	121	116

Source: Bortz Media compilation

15. In case of FOX stations, the carriage of MLB games likewise remained stable. In 2005, FOX carried 39 MLB games. In 2010-2013, that number varied between 37 and 40 games per year.

⁶ Bortz Media & Sports Group, Inc., “Cable Operator Valuation of Distant Signal Non-Network Programming: 2010-13” (“Bortz Report”), at 27-29.

⁷ The figures for WGNA in the Mansell Amended Testimony are broadly consistent, but he erroneously omits a number of MLB games in each year, and thus undercounts the number of MLB games on WGNA by 14 in 2010, 3 in 2011, 11 in 2012, and 14 in 2013. *Compare* Mansell Amended Testimony at 14 *with* Table III-1.

Table III-2. MLB Telecasts on Fox in 2004-05 and 2010-2013

	2004	2005		2010	2011	2012	2013
Regular Season	18	18		26	26	26	24
All Star Game	1	1		1	1	1	1
LDS	6	5		NA	NA	NA	NA
LCS	14	11		6	6	7	6
World Series	<u>4</u>	<u>4</u>		<u>5</u>	<u>7</u>	<u>4</u>	<u>6</u>
TOTAL	43	39		38	40	38	37

Source: Bortz Media compilation

16. Further, Mr. Mansell omits entirely any analysis of compensable NFL games on FOX stations. As set forth in the Table III-3 below, the number of NFL games on FOX remained steady for the periods 2004-2005 and 2010-2013.

Table III-3. NFL Telecasts on Fox in 2004-05 and 2010-2013

	2004	2005		2010	2011	2012	2013
Preseason	2	2		3	3	3	3
Regular Season	28	28		27	27	27	27
Playoffs	4	4		4	4	4	4
Super Bowl	1	0		1	0	0	1
Pro Bowl	0	0		1	0	0	0
TOTAL	35	34		36	34	34	35

Source: Bortz Media compilation

C. Marketplace Evolution

17. Mr. Mansell's discussion of the evolution of the media programming landscape also is incomplete and misleading because it ignores the broader context beyond Sports programming. The proliferation of new outlets, platforms and technologies between 2004-05 and 2010-13 had a far greater impact on other types of programming than on Sports — meaning that the *relative* value of Sports was not diminished, but if anything was enhanced, by those changes.

18. Between 2005 and 2010, the available outlets and platforms for syndicated series and movies had greatly expanded. In addition to non-sports cable networks, services like

Netflix, Amazon and Hulu provided ample opportunity to fulfill the needs of the non-sports fan, resulting in the relative devaluation of this type of programming on distant broadcast signals. Such programming is also highly susceptible to time-shifted viewing, using technology such as DVRs. The proliferation of non-broadcast options for viewing movies, TV series and most other types of programming diminished the relative value of such programming available on distant broadcast signals between the 2004-2005 and 2010-2013 time periods. In contrast, the avenues for viewing Sports programming remained relatively limited during this period, and Sports telecasts inherently are relatively “DVR-proof” — fans want to see the game in real time, not after the contest has been decided and the score is known.

19. Further, not only did the Program Suppliers content become more and more abundant across multiple platforms since the 2004-05 time period, but the availability of competing content has been steadily increasing since then. The nature and quality of original content being offered on cable and premium networks, as well as OTT platforms such as Netflix and Amazon, is competing directly with the more traditional broadcast offerings and has, since the 2004-2005 period, continued to improve and expand. For instance, perhaps the signature syndicated program carried on WGNA during the 2010-13 period, *30 Rock*, was also available on Netflix during the 2010-13 period.⁸

20. In contrast, Sports programming is a unique product, one that cannot be duplicated or substituted. A fan will not accept a game from a different team or the substitution of one team for another. Fans tune in (live) to root for their particular team; no other content will

⁸ See Spangler, Todd, *Netflix Adds 'The Office' and '30 Rock' Final Seasons, Other NBC Shows on Oct. 1*, Variety (Sept. 30, 2013), <http://variety.com/2013/digital/news/netflix-adds-the-office-and-30-rock-final-seasons-other-nbc-shows-on-oct-1-1200682400/>; Wallenstein, Andrew, *NBCUniversal, Netflix Renew Deal*, Variety (July 13, 2011), <http://variety.com/2011/tv/news/nbcuniversal-netflix-renew-deal-1118039822/>.

do. Further, unlike syndicated and movie content, the supply of premium sports content is relatively fixed, which makes it all the more valuable.

21. A unique aspect of Sports programming that has rendered it comparatively immune to the proliferation of viewing options is its live, must-see-in-real-time nature. According to a recent report by Nielsen, sports programming is still overwhelmingly viewed on a live basis in contrast to other types of programming. This study found that “[w]hile the rise in time shifted viewing has altered viewing habits for nearly all program genres, live viewing remains the standard for sports. According to TV data from fourth quarter 2015, 95% of total sports viewing happens live. In comparison, only 66% of general drama viewers watch live.”⁹

22. These findings are consistent with my industry knowledge and experience. Sports fans want to watch their teams live; there is little interest in replays of games after the fact. Viewers of more traditional entertainment fare often “bank” one or more episodes of recent broadcasts on their DVR, or may even wait until the show has completed its season and then binge watch from the start.

IV. MS. HAMILTON’S TESTIMONY MISAPPREHENDS THE RELEVANT FACTORS IN MVPD’S DISTANT SIGNAL CARRIAGE DECISIONS

A. Carriage of WGNA in 2010-13 was not Predicated on Bundling or Mere Legacy Status

23. Ms. Hamilton asserts that cable systems carried WGNA as a distant signal “simply because it was required as part of the Tribune bundle, without regard for the particular content appearing on WGN. The original decision to carry WGN was made to provide subscriber access to other Tribune-owned stations, particularly major in-market broadcast

⁹ The Nielsen Company, *Year in Sports Media Report* at 4 (2015), <http://www.nielsen.com/us/en/insights/reports/2016/the-year-in-sports-media-report-2015.html>. Further, sports accounted for 93 of the top 100 live-viewed programs in 2015, compared to just 14 in 2005. *Id.*

network affiliates, and not necessarily because of content retransmitted on WGN.”¹⁰ She further asserts that “[t]he continuation of WGN carriage after it was unbundled from Tribune station retransmission consent was primarily due to the legacy carriage considerations . . . rather than the content itself.”¹¹

24. That was not the case with respect to the carriage of WGNA by DIRECTV during 2010-13. As noted above, during the period covering 2010-2013, I negotiated the agreement for DIRECTV to continue receiving the satellite signal of WGNA. That agreement was not conditioned on DIRECTV being required to carry WGNA in exchange for Tribune granting carriage rights for other Tribune stations. Moreover, I considered DIRECTV’s continued carriage of WGNA to be justified on the strength of WGNA’s own programming — and in particular its Sports programming. The MLB and NBA games on WGNA served a particular fan base and were therefore an important part of the DIRECTV channel lineup. Ceasing carriage of WGNA no doubt would upset many subscribers, largely due to the passion of those sports fans. The live MLB and NBA programming on WGNA was what I was particularly interested in carrying as a programming executive, and little or none of the other programming on WGNA would have risen to the level of “important” in my opinion.

25. It is also notable that data from Cable Data Corp (“CDC”) show that bundling of WGNA with other Tribune-owned stations was not as prevalent as Ms. Hamilton suggests. The CDC data show that in 2010-13 (1) 169 Form 3 cable systems carried a Tribune signal other than WGN (on a local or distant basis) while not carrying WGN during the same period; and (2) 725

¹⁰ Written Direct Testimony of Sue Ann R. Hamilton (“Hamilton Testimony”), at 7 (Dec. 22, 2016).

¹¹ *Id.*

Form 3 cable systems carried WGN as a distant signal while not carrying another Tribune signal during the same period.¹²

26. Ms. Hamilton also states that a “very important” factor in her programming decisions was legacy carriage, especially in the case of distant signals.¹³ In my experience, while legacy carriage was a factor in determining which channels to carry (or cease carrying), it was not a “very important” one in 2010-13. Other factors are more significant, and carry more weight, than legacy carriage including (1) cost, (2) strength of product on channel (with live sports programming being a very important factor), and (3) carriage by the competition. That being said, legacy considerations can be stronger for signals/networks carrying sports programming given sports’ fans devotion to their favorite team(s). The passion of sports fans means that they will quickly find an alternative provider if an MVPD drops the channel carrying their team. It is easier to suggest alternative programming or alternative channels when the programming affected is not live sports.

27. During the 2010-13 period the margins on programming packages were squeezed each year due to ever increasing programming costs, and each channel was examined for its cost in relation to the demand for its content, including distant signals. I did not consider distant signal costs “immaterial” as Ms. Hamilton asserts in her testimony.¹⁴ During 2010-2013, WGNA accounted for over 70% of the total Section 119 royalty fees paid by DIRECTV, and it would not have incurred these fees for “legacy” reasons. Rather, DIRECTV carried WGNA because it had strong sports programming and represented a good value. It did not carry the channel simply because it had a history of carrying it.

¹² See Written Rebuttal Testimony of Jonda K. Martin at 2 (Sept. 15, 2017).

¹³ Hamilton Testimony at 6.

¹⁴ *Id.* at 8.

B. Sports Programming Would Command the Greatest Value if Distant Signal Programming were Purchased a la Carte

28. Ms. Hamilton states in her testimony that “individual programs or categories of programs, . . . in my experience, are virtually never negotiated for, or acquired, on an individual level.”¹⁵ This is generally true; MVPDs typically pay a monthly per-subscriber affiliate fee to carry an entire network and do not purchase programming individually. But it does not mean that MVPDs value programming contained on networks they carry similarly. If MVPDs did purchase programming individually, I would expect them to pay considerably more for live professional and college team sports programming than any other category of programming.

29. In fact, in my experience at DIRECTV, I would have preferred to negotiate for individual game telecasts rather than paying the affiliate fees associated with carrying entire RSNs. MVPDs ascribe virtually all of the value on an RSN to its live sports programming, giving little value to the other programming that fills out the schedule. Carrying only individual games would have saved capacity and would have allowed me to cut the programming that I did not consider to be as valuable.

30. While the standard practice is for MVPDs to negotiate for the right to carry entire signals or cable networks, that does not suggest that they value all programming on a channel equally, or that all of the programming is material to the MVPD’s carriage decision. Rather, MVPDs look for signature or marquee content or shows on a particular signal or network (e.g., live sports), or content that differentiates it from other offerings on the system. For example, in the case of WGNA, the principal value in carrying that network came from the live professional sports programming.

¹⁵ Hamilton Testimony at 2.

31. Some other programming on WGNA conferred little to no value. I ascribed little value to the syndicated programming and movies on WGNA in 2010-13. In addition, during that time period, WGNA also carried paid “infomercials.” DIRECTV was required to retransmit the full WGNA signal provided by Tribune and could not remove or replace any of the programming. However, infomercials on distant signals carried no value to an MVPD operator and, in fact, were viewed negatively. If it had been possible, I would have preferred not to carry those infomercials.

C. Viewership Does Not Equate With Value

32. Ms. Hamilton states in her testimony that “subscriber viewing behavior” was one of the factors she considered in making her programming decisions.¹⁶ But viewership does not equate with value, particularly for Sports programming. That fact is illustrated by the license fees MVPDs pay to carry sports networks and other types of networks. In my experience, Sports programming has a far greater value per unit of viewing than other types of programming. This is borne out by the analysis presented by Dr. Mark Israel in his rebuttal testimony.¹⁷ Dr. Israel examined the relationship between viewing and programming expenditures for different types of networks, and found that for the top 25 cable networks, while the number of JSC programming hours transmitted on these networks represented only 1.06% of all programming and less than 3% of household viewing hours (“HHVH”), this programming commanded more than 22% of the amount those network spent on programming. Moreover, the relationship between viewership and value is even more attenuated in the case of distant signals than it is for cable networks, because MVPDs, which utilize ratings to value advertising time, cannot insert advertising into distant signals as they can for cable networks.

¹⁶ Hamilton Testimony at 5–6.

¹⁷ Israel Rebuttal Testimony at 19–21, 23–25.

33. Similarly, in examining the cable networks TBS and TNT, which carry both JSC sports and other types of programming, Dr. Israel found that in 2010-13 JSC programming comprised only 5.52% of HHVH on TBS and 7.93% percent of HHVH on TNT, but 44.40% of TBS's program expenditures, and 45.56% of TBS's program expenditures, were for JSC programming.¹⁸

34. This is also illustrated by the license fees paid by MVPD's to carry different cable networks. Depending on their content, two different networks with the same level of viewing may command very different license fees; conversely, two different networks that command equal license fees may have very different viewing. In my experience, the networks that command the greatest license fees relative to their viewing tend to be those that carry Sports programming. For example, in 2014, ESPN's licensing fees were \$5.54 per subscriber, and it averaged 2.21 million total viewers – a 2.51 ratio. In that same period, the licensing fees for the most-watched network, USA Network, were \$0.71 per subscriber, and it averaged 2.68 million total viewers – a 0.26 ratio – while the Disney Channel's licensing fees were over \$1.15 per subscriber, and it averaged 2.44 million total viewers—a 0.47 ratio. ESPN carries JSC programming, while the Disney Channel and USA Network carry almost exclusively Program Suppliers programming.

D. Bortz Survey Program Definition

35. Ms. Hamilton asserts in her testimony that most cable operators would be confused by “the program categories that have been adopted for this proceeding and in the Bortz Survey” because she believes they are “quite different from the industry understanding of what programming typically falls in a particular programming genre.”¹⁹ I disagree. The program

¹⁸ Israel Rebuttal Testimony at 24.

¹⁹ Hamilton Testimony at 10.

categories used in the Bortz survey are logical and clear to industry professionals. MVPD programming executives understand the distinctions between these types of programming, and are accustomed to thinking about and analyzing them as distinct categories.

36. It is generally understood, for example, that live professional and college team sports competitions comprise a distinct and uniquely valuable subset of programming. Ms. Hamilton suggests that the Sports category — defined as “live telecasts of professional and college team sports” — may be confusing to MVPD executives because they might not “immediately realize” that this definition excludes programming such as “NASCAR and Formula One racing; PGA and LPGA golf tournaments; professional tennis matches; individual and team performance ‘ninja’ and ‘warrior’ races; cycling, running, and swimming competitions; and even the Olympics”²⁰ But it is clear from the definition for the Sports category that it includes only professional and college *team* sports. Based on my industry knowledge and experience, MVPD programming executives would not be confused by that definition. It is expressly limited to team sports, and it includes only professional and college sports. Programming executives understand the fundamental difference between a team sport like baseball, and an individual sport like golf, and are not likely to include golf or other individual sports in their valuation of team sports programming. The natural inference from this definition would be to think of the programming associated with the JSC leagues — NFL, MLB, NBA, NCAA and NHL. Games from these leagues are the big ticket items that every MVPD must have in order to compete. They are, more frequently than any other category of programming, the sort of “signature programming” discussed above which MVPDs focus on in making carriage decisions. Given the great importance and value of professional and college team sports in the

²⁰ Hamilton Testimony at 11.

industry, it is second nature to think of them as a distinct category. In light of that fact, and the easily comprehensible distinction between team and individual sports, I do not believe programming professionals would be confused by Bortz's definition of the Sports category.

E. MVPD Expenditures on Sports

37. Ms. Hamilton states in her testimony that "cable operators spent an average of 33-35% of their overall cable television programming budget on cable sports channels" during the 2010-13 period, with the most significant share of that spending going towards NFL, NBA, NHL and MLB games appearing on national cable networks (like ESPN) and RSNs.²¹ In my opinion that number is conservative. In 2016, SNL Kagan estimated that sports programming accounts for 40% of programming costs for cable, satellite and telco video providers. In a 2012 Los Angeles Times article, Cox Cable programming executive Bob Wilson estimated that sports accounted for more than 50% of the bill for Cox's Southern California subscribers.²² The rising costs of live team sports programming further demonstrates the value of the live sports programs on distant signals at issue in these proceedings.

V. DR. STECKEL IS INCORRECT TO SUGGEST THAT MVPD EXECUTIVES ARE ILL-EQUIPPED TO PROVIDE RELATIVE VALUATIONS OF PROGRAMMING

38. In his written direct testimony, Dr. Steckel asserts that because MVPD executives generally make decision about the carriage of networks, as opposed to specific programs, the Bortz (and Horowitz) surveys ask respondents to "make judgments about unfamiliar constructs."²³ I disagree with Dr. Steckel. In my role as a programming executive at DIRECTV during the 2010-13 period, I was attuned to the relative costs and value of the programming on

²¹ Hamilton Testimony at 11-12.

²² Flint, Joe and Meg James, *Rising Sports Programming Costs Could Have Consumers Crying Foul*, L.A. Times (Dec. 01, 2012), <http://articles.latimes.com/2012/dec/01/business/la-fi-1202-ct-sports-cost-20121202>.

²³ Written Direct Testimony of Joel Steckel, at 24 (Dec. 22, 2016).

the stations that DIRECTV chose to carry. In order to negotiate effectively for carriage of any station, it was necessary for me to be aware of the signature programming carried by that station, and, in many instances, to research what the station had paid for the rights to that programming. Moreover, cable networks and station groups would frequently provide their own analyses during negotiations that highlighted the key programming they offered and what made that individual programming important, in order indicate what made their network or station a good value proposition. It would not have been possible to do my job effectively without analyzing the value of the key programming carried by a station I was considering for carriage on DIRECTV.

39. Moreover, many cable networks focus on carrying particular types of programming: there are sports networks, networks devoted to series and/or movies, news networks, religious programming networks, “PBS look alike” networks, etc. Negotiating the carriage of such networks entails knowledge of the relative value of their content.

40. For these reasons, MVPD programming executives were well-equipped to respond to the relative-value question in the Bortz survey. Dr. Steckel’s analogy to students estimating the size of body parts is inapt.²⁴ His students are not trained to estimate the size of different body parts and presumably have no experience doing so. But part of the job of the programming executive is to follow the trends on the costs of various types of programming.

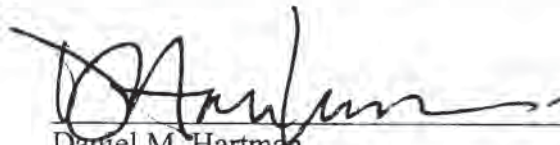
41. I also disagree with Dr. Steckel’s suggestion that the Bortz survey’s relative-value question is too complex for programming executives to answer adequately. MVPD

²⁴ *Id.*

programming executives are responsible for negotiating broadcast station and cable network carriage agreements, and therefore understand the categories of programming and what “non-network” means, and (as discussed above) are familiar with the various types of programming addressed by the Bortz survey and their relative values.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2017.


Daniel M. Hartman

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IN THE MATTER OF:)
) Docket No.
DETERMINATION OF CABLE) 14-CRB-0010-CD
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4 IN THE MATTER OF:)

5) Docket No.

6 DETERMINATION OF CABLE) 14-CRB-0010-CD

7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

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17 March 12, 2018

18

19 9:05 a.m.

20 VOLUME XIII

21

22

23 Reported by: Karen Brynteson, RMR, CRR, FAPR

24

25

1 focused more directly than any other evidence
2 to the issue presented, relative market value?

3 A. That's what it says, yes.

4 MR. LAANE: Nothing further.

5 JUDGE BARNETT: Is Mr. Hartman
6 available?

7 MR. LAANE: He is, Your Honor.

8 JUDGE BARNETT: Then let's get
9 started.

10 (The witness stood down.)

11 JUDGE BARNETT: Thank you, Dr. Israel.
12 Sorry.

13 THE WITNESS: Thank you.

14 JUDGE BARNETT: Thank you.

15 Please be careful finding your way to
16 the chair.

17 MR. HARTMAN: Yes, I will not trip on
18 anything.

19 JUDGE BARNETT: If you would, please,
20 raise your right hand.

21 THE WITNESS: Sure.

22 Whereupon--

23 DANIEL HARTMAN,
24 having been first duly sworn, was examined and
25 testified as follows:

1 JUDGE BARNETT: Please be seated.

2 MR. CANTOR: Good afternoon, Your
3 Honors. Dan Cantor of Arnold & Porter for the
4 JSC.

5 DIRECT EXAMINATION

6 BY MR. CANTOR:

7 Q. Good afternoon, Mr. Hartman.

8 A. Good afternoon.

9 Q. Would you please introduce yourself
10 for the Court.

11 A. Yes. My name is Dan Hartman.

12 Q. Would you please just give us a brief
13 background, overview, of your professional
14 background?

15 A. Sure. I have been in the television
16 and media business for 20 plus years,
17 negotiating for content, kind of
18 valuing/acquiring that content.

19 I currently serve as president of
20 Hartman Media Services, a consulting company.

21 So I provide consulting services to
22 various media clients, including content owners
23 like cable channels, content distributors like
24 satellite cable, new entrants to the market,
25 and I do a -- I do a lot of work with financial

1 institutions kind of giving advice, strategy,
2 background on just the -- this is in general,
3 whether it is the cable distributors or the
4 networks themselves, content companies.

5 Q. Now, where did you work before Hartman
6 Media?

7 A. Prior to that I was at DirecTV for 15
8 years. I spent the last seven of that as
9 Senior Vice President of Programming
10 Acquisitions.

11 So in that role I was basically
12 responsible for acquiring all the content that
13 you see on the -- on your channel guide, so
14 general entertainment networks, sports
15 networks, ESPN, kind of out-of-market sports
16 packages like your NBA League Pass, pay TV
17 channels like HBO, and also during that period
18 the group that negotiated the local station
19 carriage and the distant signals reported into
20 me as well.

21 JUDGE BARNETT: Could you put the
22 microphone closer?

23 THE WITNESS: Oh, sure.

24 BY MR. CANTOR:

25 Q. And I believe you said you negotiated

1 terms of carriage when you were at DirecTV. Is
2 that correct?

3 A. Yes.

4 Q. Do you have just a rough estimate of
5 about how many terms of carriage you may have
6 negotiated while you were at DirecTV?

7 A. Yeah. It would have been in the
8 hundreds, I'm sure.

9 Q. And where did you work before DirecTV?

10 A. Prior to that I was at Fox
11 Broadcasting Company. So I -- and there I
12 basically just served as in-house legal counsel
13 for the broadcast network. Mostly I was the
14 attorney for the Fox Sports Group.

15 Q. Do cable and satellite distributors
16 compete for the same customers?

17 A. Yeah, they do. The business model is
18 basically, I would say, the same. You are
19 getting revenue from the customers coming in.
20 And that's kind of the lifeblood of your
21 business.

22 The -- you know, we compete, I would
23 say, on programming, pricing, packaging. When
24 I was at DirecTV certainly cable was the -- by
25 far the biggest competitor we had.

1 MR. CANTOR: Your Honors, the JSC
2 offer Mr. Hartman as an expert in the valuation
3 of television programming by multi-channel
4 video program distributors.

5 MS. PLOVNICK: Voir dire, Your Honor?

6 JUDGE BARNETT: Yes.

7 VOIR DIRE EXAMINATION

8 BY MS. PLOVNICK:

9 Q. Good afternoon, Mr. Hartman.

10 A. Good afternoon.

11 Q. My name is Lucy Plovnick. I represent
12 the Program Suppliers.

13 Have you ever worked for a cable
14 operator?

15 A. I have not worked for a cable
16 operator. Like I said, I think the business
17 models are the same.

18 Q. And your experience is at DirecTV,
19 which is a satellite carrier; is that correct?

20 A. It is a satellite carrier, correct.

21 MS. PLOVNICK: Your Honor, we would
22 object to the proffer as overly broad. I guess
23 I can ask one more question.

24 BY MS. PLOVNICK:

25 Q. Would you define MVPD as including

1 both cable and satellite carriers?

2 A. Yes.

3 MS. PLOVNICK: Your Honor, JSC has
4 offered him as an expert in this MVPD
5 decision-making, but that includes cable
6 operators, not just satellite carriers. And
7 his experience is limited to satellite.

8 So we would object as an overly broad
9 offer of his experience.

10 JUDGE BARNETT: Mr. Cantor, would you
11 like to inquire further or respond?

12 MR. CANTOR: If I may, Your Honor, I
13 will both inquire further and then respond.

14 JUDGE BARNETT: Okay.

15 DIRECT EXAMINATION - Resumed

16 BY MR. CANTOR:

17 Q. Mr. Hartman, when you were at DirecTV,
18 did the programming that you were negotiating
19 for, was that the same type of programming that
20 cable operators negotiated for?

21 A. Yes, it was the same. And, in fact,
22 the contract terms would be pretty much the
23 same and, you know, rates, all the -- all the
24 terms, I guess, we would negotiate for I think
25 would be the same as a cable company would

1 negotiate for.

2 Q. And when you were at DirecTV, did
3 DirecTV carry WG -- distantly carry WGNA?

4 A. Yes, it did.

5 MR. CANTOR: Your Honor, if I may
6 respond to Ms. Plovnick?

7 JUDGE BARNETT: Yes.

8 MR. CANTOR: Mr. Hartman is a highly
9 qualified expert in the field of -- in the
10 industry of multi-platform -- multi-channel
11 video distributors.

12 He is someone who has negotiated
13 hundreds of agreements for content, and it is
14 an industry that is not just limited to cable,
15 but includes both satellite distributors as
16 well as telecom distributors as well.

17 So this is someone square right in the
18 middle of the very industry that we're talking
19 about in this proceeding.

20 MS. PLOVNICK: Your Honor, we don't
21 have an objection to Mr. Hartman testifying
22 based on his experience as a satellite carrier,
23 but he is not a cable operator.

24 So we think the proffer should be
25 limited to qualify him as a satellite carrier

1 expert.

2 MR. CANTOR: And if I may respond to
3 that as well. I think this is just an area
4 that is proper for cross-examination, that if
5 others disagree with his qualifications to
6 comment about the main competitors in the cable
7 industry, that that's something that can be
8 brought out on cross.

9 But this is someone who is, again,
10 square right in the middle of this industry,
11 and been involved with cable and satellite.

12 JUDGE BARNETT: Mr. MacLean?

13 MR. MacLEAN: Your Honor, the SDC also
14 has an objection to the qualifications of this
15 expert.

16 And we, although we do believe that a
17 foundation has been laid for an expert in
18 something, we would object to his qualification
19 as an expert in valuation absent any foundation
20 for any experience in appraisal or other
21 valuation techniques.

22 We put an objection on that basis to
23 his expertise as -- in that way.

24 JUDGE BARNETT: Thank you. Do you
25 want to respond to Mr. MacLean, Mr. Cantor?

1 MR. CANTOR: Sure. As you have heard
2 from Mr. Hartman, Your Honor, this is an expert
3 who has negotiated for all types of content
4 that are at issue in this proceeding, for
5 sports, for general entertainment, for
6 Devotional.

7 And as he has already said and as you
8 will also hear further in his testimony, he is
9 someone who had to decide whether to carry it
10 and what to pay for it, which goes to the very
11 heart of valuation of the programming.

12 JUDGE BARNETT: Now, would you state,
13 again, the areas in which you are asking that
14 he be qualified?

15 MR. CANTOR: Sure. We are asking that
16 he be qualified as an expert in the valuation
17 of television programming by multi-channel
18 video program distributors, and, if it's
19 helpful, I can ask him to define that for you.

20 JUDGE BARNETT: I'm going to consult
21 with my colleagues on this. It will just be a
22 few minutes.

23 (Judges confer outside the hearing room.)

24 JUDGE BARNETT: Please be seated.

25 MR. CANTOR: Your Honor, if I may, I

1 was hoping I could make just one more point on
2 this issue.

3 JUDGE BARNETT: You may.

4 MR. CANTOR: What we're talking about
5 here is in -- satellite and cable are two
6 different just technologies competing for the
7 same customers with the same product. It is
8 just the only difference that we're dealing
9 with is a difference in the transmission
10 technology.

11 So it is just one more reason why this
12 witness is fully qualified to be an expert
13 here.

14 JUDGE BARNETT: Ms. Plovnick?

15 MS. PLOVNICK: Your Honor, we have a
16 separate satellite proceeding here. We
17 actually moved to consolidate cable and
18 satellite and the Judges did not grant our
19 motion as to Phase 1.

20 So this is not -- cable and satellite
21 are not consolidated and so we would object.

22 JUDGE BARNETT: Okay. An expert --
23 I'm sorry I don't have the rule in front of me
24 and I can't quote the language precisely, but
25 the Judges may qualify an expert based on

1 either education, training, or experience.

2 Clearly Mr. Hartman has experience in
3 this industry and has direct experience in
4 negotiating programming carriage, station
5 programming, or station carriage, I believe is
6 his actual words.

7 And as to the difference between
8 satellite and cable, we believe that goes to
9 the weight of his testimony rather than to the
10 admissibility.

11 And for that reason Mr. Hartman is
12 qualified as an expert in valuation of
13 television programming in multi-channel video
14 distribution. Did I say all those words right?

15 MR. CANTOR: Correct.

16 JUDGE BARNETT: Okay. You may
17 proceed, Mr. Cantor.

18 MR. CANTOR: Thank you, Your Honor.

19 BY MR. CANTOR:

20 Q. Mr. Hartman, have you been retained as
21 an expert in this proceeding by the JSC?

22 A. Yes, I have.

23 Q. What was your assignment?

24 A. It was basically to provide, I guess,
25 use my experience as an MVPD executive to offer

1 my opinion as to the valuation of different
2 types of television programming.

3 Q. So you should have on the witness
4 stand there a binder with exhibits marked 1010
5 and 1011. Let's start with 1010 first, please.
6 Would you please tell us what 1010 is?

7 A. Yes. That's a copy of my written
8 direct testimony submitted in this proceeding.

9 Q. And what is Exhibit 1011?

10 A. That is a copy of my written rebuttal
11 testimony submitted in this proceeding.

12 Q. And did you prepare both Exhibits 1010
13 and 1011?

14 A. Yes, I did.

15 Q. Do you declare that Exhibit 1010, your
16 written direct testimony, is true and correct
17 and of your personal knowledge?

18 A. Yes, I do.

19 Q. Do you have any corrections that you
20 would like to offer regarding Exhibit 1011,
21 your written rebuttal testimony?

22 A. Yes. There is one correction on page
23 6, I believe, which is Table -- Table III.1, so
24 there it's just a listing of the -- of the
25 Major League Baseball telecasts on WGNA.

1 So for the year 2010, the White Sox
2 number should read 32 versus 33. So the total
3 there would reflect a 116 number versus a 117
4 number.

5 Q. I was going to ask, Geoff, if you
6 could please put Table III-1 up on the screen.

7 And if you could just repeat what you
8 were just saying, now that it is up on the
9 screen, if you could repeat what you were
10 saying for the Judges.

11 A. Oh, sure. Sure. So the only change
12 to this table is the number of White Sox games
13 in 2010 should be 32 versus 33. And so the
14 total at the bottom there should be 116 versus
15 117.

16 Q. And with this correction, do you
17 declare that Exhibit 1011, your written
18 rebuttal testimony, is true and correct and of
19 your personal knowledge?

20 A. Yes, I do.

21 Q. Thank you.

22 We have already talked about this a
23 little bit, but are you familiar with the
24 acronym MVPD?

25 A. Yes, it stands for Multi-channel Video

1 Programming Distributor.

2 Q. And would you please share with us
3 your understanding of that term?

4 A. Sure. I think of it as just more
5 traditional forms of distributing programming,
6 cable, satellite, telcos.

7 Q. Would you please provide us with an
8 overview of the competitive landscape of the
9 MVPD industry in the period 2010 to 2013?

10 A. Yeah, sure. I guess it would probably
11 be helpful to give a little bit of history on
12 the satellite business, which launched in the
13 mid 1990s.

14 And it was -- it started as more of a
15 rural play, kind of going after customers that
16 cable couldn't reach because they were the --
17 cable was the entrenched distributor. And so
18 both cable and the satellite grew for a long
19 period of time, 10, 15 years or so.

20 And so at some point in, I would say,
21 mid 2000s or maybe a little later, there, you
22 know, again, both companies were able to grow,
23 so both companies could bring on new
24 subscribers and be profitable.

25 And -- but as kind of the 2000s closed

1 out, the marketplace just became more
2 saturated.

3 So there were fewer customers to fill
4 the bucket with, meaning that instead of
5 growing the rates that cable or satellite had
6 been growing the last 15 years or so, that
7 growth had slowed because there were just no
8 customers, you know, from this bucket to fill.

9 So, in other words, cable and
10 satellite were kind of starting to take each
11 others' customers. And so at that point the
12 focus, I think, has been more on growth and
13 acquisition of customers.

14 And I think it kind of, when that
15 saturation point hit, it became more of a
16 retention play for both companies, kind of
17 making sure your customers stayed on the
18 platform. That -- that was the revenue source.

19 Q. And during this period did management
20 or containment of costs play a role in your
21 considerations?

22 A. Yeah, it did. I think, you know, it
23 is always a factor, but when you're not growing
24 at the rate that you had been growing, then
25 costs become an issue. And at a cable or

1 satellite company, programming costs were the
2 -- by far the biggest cost line item. So, yes,
3 there was more of a focus for sure.

4 Q. And so given this goal of customer
5 retention that you were just telling us about,
6 and the overlay of cost considerations as well,
7 were there particular characteristics of
8 programming that you were particularly looking
9 for as someone charged with making program
10 decisions at DirecTV?

11 A. Yeah. I think that, you know, as
12 this, again, focusing more on costs and then
13 what was important to the customer, I think
14 that you looked at really marquee or must-have
15 type programming, that -- basically programming
16 that I would say that if you lost or didn't
17 have that you were at high risk of losing your
18 customer because of it.

19 Q. Would you please give us an example of
20 what you're calling must-have or marquee
21 programming?

22 A. Yeah, I think live sports is really
23 honestly the best example. I think that there
24 are certain factors that, you know, if you had
25 a checklist of I think what was important to

1 keeping a customer on the platform, I think
2 live sports is really a great example of that.

3 I think there is, you know, multiple
4 factors. There is -- folks are really
5 passionate about sports. They are really
6 passionate about not just sports in general,
7 but their particular team.

8 So if you are a sports fan, you have
9 particular teams you follow and, you know,
10 you're just, I guess, yeah, you're just really
11 passionate about following that team or those
12 teams. And there is no other substitute for
13 that.

14 So -- and, you know, just not really
15 -- sports isn't really available many other
16 places. So you take the Cubs, for instance.
17 And if you want to catch your Cubs game and you
18 obviously are going to catch it live, it is
19 really only going to be on one channel.

20 So unlike some other types of
21 programming, you can't just kind of flip
22 through the dial and find it somewhere else.
23 It's -- it's -- you know, there is other sports
24 out there and there is other networks out
25 there, obviously, that carry sports, but if you

1 want to catch that game, it's pretty much going
2 to be on just one channel.

3 And so I think that -- and as I
4 mentioned, the fact that it is live is
5 important because I think that, you know,
6 people are just much more engaged in that kind
7 of programming, that they have to sit down and
8 watch kind of day and date for when it's on.

9 I think sports is fairly unique in its
10 content. There is nothing else like it out
11 there.

12 And I guess, kind of my prior point,
13 too, there is really no substitution for a
14 particular game. If you are, again, if you are
15 a Cubs fan and we weren't carrying WGNA, for
16 instance, or I didn't have the Yankees, I can't
17 go tell you to watch another team or another
18 sport because I just don't think -- you know,
19 again, there are many general sports fans, but
20 if you are a true fan of a team or teams, I
21 can't tell you to watch another -- a different
22 game. It is just not going to work.

23 Q. Are there examples of what you're
24 calling must-have programming other than team
25 sports?

1 A. Yeah. I think there are certain types
2 of content, like I think Game of Thrones is a
3 good example of, if you kind of ran back the
4 factors, I think it's certainly a very
5 passionate fan base, as you can see from social
6 media.

7 I think it is the type of programming
8 that people watch live or near live. I think
9 that it is not -- it is similar to sports in
10 that, you know, you don't want a spoiler, so
11 you want to catch it when it's on.

12 I think that a network like Fox News
13 is really kind of -- would fit into that
14 category. I think it is another -- it's a type
15 of network or content that has a really
16 passionate fan base. Obviously, again, people
17 watch that live.

18 It's a type of network or programming
19 that, if I didn't have, I think I would suffer
20 because of it.

21 Q. How about sitcoms, reruns of sitcoms
22 or old movies, do they have these must-have
23 qualities that you are speaking of?

24 A. No. I would say no, I think, because,
25 you know, again, if you kind of run through the

1 checklist, I don't think that it -- there is
2 certainly other avenues that you can find this
3 content on. I think there is other -- you can
4 find it on other channels a lot of times. You
5 can find it on other platforms.

6 I think if -- I know I use 30 Rock as
7 my example in my testimony, that it was carried
8 on WGNA at the time, the period we're talking
9 about here, 2010 through 2013, and the fact
10 that -- it was broadcast on WGNA but it was
11 also on, I believe, Comedy Central at the same
12 time. NBC was broadcasting their initial
13 broadcast premiers there. And it was on
14 Netflix at the time as well.

15 So I think that, you know, this type
16 of content, just because it is parsed in so
17 many places, I think it just -- it carries less
18 of a value. There is just more, more places
19 you can see it and there is more substitutes
20 for it.

21 Q. Let's talk for a minute about the
22 licensing fees that you paid for programming
23 outside of the compulsory license context when
24 you were at DirecTV.

25 A. Um-hum.

1 Q. How did the licensing fees that you
2 paid for team sports programming compare to
3 licensing fees for other types of programming?

4 A. Well, it was multiples. I think it's
5 no secret that ESPN is, I guess, I would call
6 it a poster child for high sports rights fees,
7 and everybody kind of reads in their local
8 paper, when there is a dispute, how much ESPN
9 costs.

10 So if I use that as an example, I
11 think that, you know, I can say that if I
12 looked at ESPN and its license fees in any
13 given year, and then I guess compared it
14 against some, you know, networks that don't
15 carry sports, that would be, you know, in the
16 higher range of content like a USA Network or a
17 Disney, you would, you know, if you did the
18 comparison, you could see that ESPN would be
19 multiples, probably four-five-six-seven times
20 of what those other networks would be.

21 Q. Have you reviewed the written
22 testimony of Program Suppliers' witness Sue Ann
23 Hamilton?

24 A. Yes, I have.

25 Q. Ms. Hamilton testifies that audience

1 viewing is the best measure of the relative
2 value of programming.

3 In your experience in the industry, is
4 there a one-to-one correlation between audience
5 viewing and value?

6 A. No, not to my prior point. I think
7 that -- I think if you could -- you could look
8 at it one of two ways.

9 I think in the example that I gave
10 you, if you are kind of comparing ESPN to, say,
11 a Disney or a USA Network, those networks, I
12 put an example in my testimony, we looked at a
13 certain year and it had certain viewer --
14 similar viewership, all three of those
15 networks, and then you could just see how
16 wildly different the license fees were.

17 And, conversely, I think you could
18 look at networks that have similar license
19 fees. So they could be all bunched together
20 and within a small range, but they could have
21 greatly different viewership numbers.

22 Q. Have you reviewed the written
23 testimony of Dr. Mark Israel?

24 A. Yes, I have.

25 Q. I will ask Geoff to place on the

1 screen Table 9 from Dr. Israel's written
2 rebuttal testimony.

3 Would you please tell us what this is?

4 A. Yes. So this is Dr. Israel's -- I
5 think he called it his cable content analysis.

6 And basically what he performed here
7 was he looked at -- basically he kind of took
8 the top 25 networks in terms of distribution
9 and then he basically kind of broke out the
10 expenditures that all of these top 25 networks
11 spent for JSC and non-JSC programming.

12 So you can see the line item from JSC
13 programming, the expenditures line, and kind of
14 as a percentage of overall budget you can see
15 that number of 22, almost 23 percent.

16 And so then, for comparison purposes,
17 he did this so that you could kind of see how
18 there really is no -- that correlation really
19 isn't there because, if you look at the
20 household viewing hours, it represents less
21 than 3 percent of the Joint Sports Claimant
22 programming, less than 3 percent of the
23 overall, you know, viewing hours of all those
24 top 25 networks, programming hours, again,
25 another small number.

1 But I think it just really goes to
2 show you that the viewership and the value or
3 expenditures that people are spending on -- or
4 that networks are spending on this programming
5 just doesn't -- that doesn't correlate.

6 Q. And we're now going to place on the
7 screen Table 10 from Dr. Israel's written
8 rebuttal testimony.

9 Would you please tell us about this
10 table?

11 A. Sure. So this is a similar analysis
12 although he just -- he broke it down for two
13 specific networks. And I think these are
14 illustrative, because I think that both of
15 these networks carry JSC and non-JSC
16 programming. So you can see, you know, CBS
17 carries Major League Baseball, among other
18 things, and TNT carries NBA games.

19 And so, again, you can kind of just
20 see he took the overall programming budget for
21 both of these channels and then broke out the
22 JSC programming, you know, and the non-JSC
23 programming.

24 So you can just kind of see the
25 expenditures item list there in column C,

1 again, near 50 percent for these channels is
2 what they are spending on the JSC programming.
3 And then if you look at the household viewing
4 hours or the programming hours, the percentages
5 are just much, much less.

6 Q. Are the results that you're talking
7 about in Dr. Israel's analysis in Tables 9 and
8 10 from his rebuttal testimony, are these
9 consistent with your experience in the
10 distribution industry?

11 A. Yes, they are.

12 Q. What role does audience viewing data
13 play in the video distribution industry?

14 A. I mean, certainly we looked at it. It
15 is one of a number of factors that we would
16 look at when we were kind of commencing
17 negotiation.

18 Personally I would look at it. I
19 would do basically an analysis of the last
20 several years. If the channel is coming up for
21 renewal, it was just kind of more of a
22 benchmark to see how it had performed, whether
23 ratings had kind of been generally going up or
24 generally going down.

25 But it was definitely not a

1 determinative factor in -- in negotiations.
2 And certainly when it came to the 11th hour,
3 the focus was much more on how important was
4 that particular type of programming that
5 channel had versus what its ratings were.

6 And, you know, it is clearly they are
7 used for ad sales purposes. You could look at
8 a TBS or a TNT and they certainly bring in a
9 decent amount of their revenue from advertising
10 sales.

11 And so ratings are important to the
12 networks themselves. But MVPDs don't really --
13 the amount of advertising time we get and the
14 amount we sell is just not a big revenue item
15 for us. So that doesn't really factor in.

16 It's not -- really in normal
17 experience, I never remember it being part of a
18 contract, so it was never -- ratings were never
19 kind of part of a rate sheet that said, well,
20 if your ratings go up on this network, then
21 your rate goes up and, vice versa, if your
22 ratings go down, your rate goes down.

23 It was not ever in the representations
24 and warranties or breaches, so just, again, it
25 was a factor we looked at, but, again, when

1 push came to shove in making a decision or, you
2 know, negotiating the contract, it didn't fit
3 in there.

4 And we did not, certainly when I was
5 -- when the station group was reporting it to
6 me, we did not use ratings for evaluating
7 distant networks.

8 Q. Thank you.

9 I'd like to now discuss for a few
10 minutes DirecTV's carriage of distant signals.

11 Did DirecTV carry WGNA during the
12 period 2010 to 2013?

13 A. Yes, it did.

14 Q. Do you know how much of DirecTV's
15 spending for Section 119 royalties were paid
16 for retransmitting WGNA?

17 A. Yeah, on average it was about
18 75 percent of the amount that we paid into the
19 copyright tribunal was for carriage of WGNA.

20 Q. Why did DirecTV carry WGNA?

21 A. It was definitely because of the live
22 sports. It was -- we saw real value in, you
23 know, there was, I think, 100 or so games. We
24 saw real value in the Cubs, the Bulls, and the
25 White Sox.

1 And I think that they not only serve,
2 you know, certainly look at a team like the
3 Cubs, which has a national following, they
4 certainly, you know, have a following
5 nationwide.

6 And so it serves a particular fan base
7 in that respect. But also just having national
8 games is important. You know, a lot of -- you
9 have a lot of networks out there, MLB or ESPN,
10 that carry nationally-televised games and
11 sports fans, you know, it's -- it's -- when
12 sports fans are looking for something, even if
13 you are not a particular fan of that maybe
14 team, you're going to want to watch sports. So
15 it was valuable to us.

16 Q. Did you place value on the syndicated
17 sitcoms and movie reruns on WGNA?

18 A. Not really. I don't think that at the
19 time I probably, when I was negotiating our
20 deal, I think I may have known what, you know,
21 had a general idea of what else was on other
22 than the Cubs games, but -- and then the White
23 Sox and Bulls, but I think that it wasn't -- it
24 wasn't a -- I wouldn't have really put a lot of
25 value on that, I guess.

1 I think that, you know -- and just
2 getting back to the ratings, I think you could
3 say that, you know, a show like 30 Rock or a
4 Saturday night movie may have decent ratings,
5 and they may have done, you know, fairly well
6 on a network like WGNA.

7 But I think that, again, you go back
8 to what's really important, what I consider
9 important to the customer.

10 And so even though a show may have
11 decent ratings, I think in the examples of a 30
12 Rock -- a sitcom or a movie, people aren't
13 sitting down to watch, I don't think, that
14 particular show day and day. I don't think
15 someone is sitting down every night to watch
16 Seinfeld or 30 Rock at a certain time.

17 So I think that, you know, again, it's
18 kind of fungible, that if I were to have to
19 drop WGNA, I would have a much harder time
20 telling the subscriber to find their sports
21 content elsewhere, where I wouldn't have as
22 difficult a time telling that subscriber where
23 to find the more general entertainment sitcom
24 and movie-type programming. There are lots of
25 other places for them.

1 Q. Did you negotiate a carriage agreement
2 with WGNA during the period 2010 to 2013?

3 A. Yes, I did.

4 JUDGE BARNETT: Before we go there, it
5 is time to stop for the day. So we will be at
6 recess until 9:00 o'clock in the morning.

7 (Whereupon, at 4:40 p.m., the hearing
8 recessed, to reconvene at 9:00 a.m. on Tuesday, March
9 13, 2018.)

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IN THE MATTER OF:)

) Docket No.

DETERMINATION OF CABLE) 14-CRB-0010-CD

ROYALTY FUNDS) (2010-2013)

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4 IN THE MATTER OF:)

5) Docket No.

6 DETERMINATION OF CABLE) 14-CRB-0010-CD

7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

13 Library of Congress

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17 March 13, 2018

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19 9:06 a.m.

20 VOLUME XIV

21

22

23 Reported by: Karen Brynteson, RMR, CRR, FAPR

24

25

1 JUDGE BARNETT: Off the record.

2 (Discussion off the record.)

3 Whereupon--

4 DANIEL HARTMAN,

5 a witness, called for examination, having previously
6 been duly sworn, was examined and testified further as
7 follows:

8 JUDGE BARNETT: Mr. Hartman, you
9 remain under oath.

10 THE WITNESS: Yes. Okay.

11 JUDGE BARNETT: Mr. Cantor?

12 MR. CANTOR: Good morning, Your
13 Honors.

14 DIRECT EXAMINATION -- RESUMED

15 BY MR. CANTOR:

16 Q. Mr. Hartman, when we were breaking for
17 the day yesterday, you were just finishing
18 summarizing for us why DirectTV carried WGNA
19 during the period of 2010 to 2013.

20 Just for -- to kind of reset the
21 context, would you please just briefly
22 summarize these reasons for us now.

23 A. Oh, sure. So I think I walked through
24 the fact that we -- you know, in our decision
25 to launch it and continue carrying it, we -- we

1 put a high value on the live team sports. So
2 it had 100 games, which is comparable to what
3 you might find on a regional sports network,
4 and served a national audience. You know, we
5 just didn't find as much value on clearly
6 something like infomercials, which took a big
7 part of the day, overnights or the, you know,
8 the more syndicated movie-type content, the
9 kind of stuff you find other places.

10 Q. Have you reviewed the written
11 testimony of Mr. Mansell, one of the Program
12 Suppliers' witnesses?

13 A. Yes, I have.

14 Q. Mr. Mansell asserts that during this
15 period, 2010 to 2013, that there was a
16 proliferation of regional sports networks, and
17 he asserts that this proliferation devalued or
18 reduced the volume of the team sports on
19 distantly transmitted signals.

20 Do you have an opinion about
21 Mr. Mansell's statement?

22 A. Yeah, I do. I think there are -- I
23 have a couple of opinions. One, I think he's
24 right when he talks about, you know, the high
25 value of sports. We talked about it a little

1 bit yesterday. And the fact that, you know,
2 these sports costs really are going through the
3 roof and, you know, doubling what non-sports
4 costs are.

5 So I think it -- it's true that there
6 are -- you know, these sports costs are
7 increasing, but I think that it just goes to
8 show you that people are paying these rights
9 fees because sports are so important.

10 But I also think that it shows when he
11 does talk about the -- you know, the fact that
12 these new RSNs are popping up over the last 15
13 or 20 years, and that's also true, that, again,
14 I think it just goes to show you the power of
15 live team sports.

16 I think that there's no other content
17 I'm aware of, you know, in all my years at
18 DirectTV, that you could take and form a new
19 network and get carriage, get, you know, good
20 distribution, if not full distribution, at a
21 high license fee, other than just live sports.

22 I think, you know, operators weren't
23 thrilled when these new networks, these RSNs
24 came along, but we knew we had to have them.

25 Q. Do you know how the amount of team

1 sports on WGNA in the period -- in the period
2 2004 to 2005 as compared to 2010 to 2013, how
3 the volume of sports compared between those
4 periods?

5 A. It didn't decline.

6 Q. And if I can, let's put up on the
7 screen Table Roman numeral III-1 from your
8 written rebuttal testimony, please. Would you
9 please tell us what this is?

10 A. Sure. This is a table that sets forth
11 the -- basically the JSC telecasts that
12 appeared on WGNA for those two periods that you
13 just referenced. So if you look at the table,
14 it walks you through the number of Cubs games,
15 White Sox games, and Bulls games for 2004 and
16 2005, and you can see the totals at the bottom
17 there.

18 And then you jump to 2010 through
19 2013, again, you can see the totals at the
20 bottom, and there's no -- there's no decrease.
21 In fact, there's probably a slight increase in
22 number of games.

23 Q. And is this the table that you offered
24 a correction on at the beginning of your
25 testimony yesterday?

1 A. Yes. This is the table where the
2 White Sox -- the number of White Sox games in
3 2010 should read 32, so that total in 2010
4 should read 117 -- 116, excuse me.

5 Q. And does that correction at all change
6 your opinion?

7 A. No, no.

8 Q. And we're going to put on the screen
9 now Table Roman numeral III-2 from your written
10 rebuttal testimony.

11 Would you please tell us what this is?

12 A. Sure. So this is a similar table. It
13 shows the Major League Baseball telecasts on
14 Fox for those two periods that we were talking
15 about. So it just -- if you go down the left
16 side there, it just details the type of game,
17 regular season, all star, league division,
18 league championship, world series, and then
19 totals at the bottom, the total number of
20 telecasts. So, again, for 2004 and 2005, you
21 can see the totals there at the bottom.

22 Jump to 2010 through 2013, and, again,
23 you can see the totals, and there's really --
24 really no difference, maybe a game or two, but
25 nothing at all that I would deem material.

1 Q. And now we're going to put on Table
2 Roman numeral III-3 from your rebuttal
3 testimony. And would you likewise explain to
4 us what this chart shows.

5 A. Sure. So this is a similar telecast,
6 which just lays out the NFL telecasts that
7 appeared on the Fox network for those two
8 periods. And, again, on the left side -- on
9 the left side, you can see it's preseason
10 games, regular season, playoffs, Superbowl, and
11 Pro Bowl. So it lists the type of games. And
12 then for the totals 2004-2005 there at the
13 bottom, you can see the numbers.

14 And again if you jump to 2010 through
15 2013, it's virtually identical. So, again, no
16 decline there.

17 Q. In Mr. Mansell's written testimony,
18 did he address changes in the media programming
19 landscape outside of team sports programming?

20 A. No, he didn't. I think that if he
21 had, I think he would have -- if you would have
22 looked at -- because I know he brings up the
23 fact that all these new technologies have
24 created these new opportunities, and I think
25 that's also correct in his testimony, but I

1 think what that has led to as well is the
2 proliferation of the more non-sports type
3 content, sitcoms and movies, just going to more
4 sources. So not only is it, you know,
5 increasing across the number of networks it's
6 on but then there's all these new platforms
7 like Netflix and Hulu and Amazon and YouTube
8 that you'll find this content as well.

9 Q. Thank you. Let's turn back to the
10 Bortz survey for a minute.

11 Did you reach any opinion about the
12 results of the Bortz survey?

13 A. Yeah, I guess based on my experience,
14 his findings were consistent with how I think a
15 multi-channel executive would basically value
16 the categories of programming.

17 Q. So we yesterday were talking a bit
18 about the written testimony of Program
19 Suppliers witness Ms. Sue Ann Hamilton.

20 A. Um-hum.

21 Q. Ms. Sue Ann Hamilton suggests that the
22 program categories adopted for this proceeding
23 and that were used in the Bortz survey would be
24 -- would be, I think her words were, confusing
25 to distributors.

1 Do you agree with her on that?

2 A. No, because I think that they're -- it
3 seems pretty -- they seem pretty self-evident
4 and clear to me. I think that if you look at,
5 you know, live professional college team
6 sports, I think that's fairly -- I think if you
7 asked a -- an executive in our business, what
8 that meant they would say that it really speaks
9 to the major -- the marquee leagues, NFL, MLB,
10 et cetera, and kind of the premier or marquee
11 college team sports like basketball and
12 football.

13 Q. Did you also review the testimony of
14 Program Supplier witness Dr. Joel Steckel?

15 A. Yes, I did.

16 Q. Dr. Steckel asserts, among other
17 things, that the task of asking distributors to
18 value different types of programming would be
19 what he calls unfamiliar.

20 And he says that's so because
21 distributors typically purchase whole channels
22 of programming, rather than, you know,
23 individual pieces of programming.

24 Do you have a view about his
25 assertion?

1 A. Yeah. I mean, it's true that we do
2 mostly negotiate for linear channels, but I
3 think when you look at the types of linear
4 channels that we negotiate for, they really do
5 fall into categories such as news or movies or
6 sports.

7 So I think that just, you know, kind
8 of by default, we negotiate for different types
9 of programming, even though it may be a channel
10 of programming, but I think that it's --
11 basically, it's our day-to-day job to kind of
12 know those, that type of programming.

13 Q. Thank you, Mr. Hartman. I have no
14 further questions.

15 CROSS-EXAMINATION

16 BY MS. PLOVNICK:

17 Q. Good morning, Mr. Hartman.

18 A. Good morning.

19 Q. I'm Lucy Plovnick. I represent
20 Program Suppliers. How are you?

21 A. Good, thank you.

22 Q. All right. So, Mr. Hartman, I want to
23 start with your direct testimony, which was
24 Exhibit 10-10, or 1010. And if you flip to
25 Appendix A, which is your resume at the back.

1 A. Oh, okay.

2 Q. So just to confirm, you worked at
3 DirecTV from 1998 to 2013; is that correct?

4 A. That's correct.

5 Q. And before that, you worked at Fox
6 Broadcasting and Fox Sports?

7 A. That's correct.

8 Q. But you have never been a cable
9 operator; is that correct?

10 A. I have never been a cable operator,
11 but I've worked in the MVPD industry.

12 Q. In the MVPD industry. And you would
13 define that as cable and satellite industry
14 combined, when you define -- or just define
15 MVPD.

16 A. Well, I think it is the more
17 traditional technologies of satellite and
18 cable.

19 Q. Right. But just to be --

20 A. Just that these bubbles are the same.

21 Q. Just to be clear, though, you have
22 never worked in the cable side of this
23 industry; your experience is in the satellite
24 side of this industry?

25 A. I have never worked for a cable

1 company.

2 Q. All right. Now, you mentioned some
3 boards that you worked on at the bottom and you
4 mentioned The Tennis Channel?

5 A. Um-hum.

6 Q. And you also mentioned the Southern
7 California Committee for the Olympic Games.

8 A. Um-hum.

9 Q. Do you consider tennis and the
10 Olympics to be sports?

11 A. Do I consider them to be -- sports as
12 a very general category?

13 Q. Well --

14 A. I mean, if you're talking about a
15 broad category of sports, yes, there's --

16 Q. Is it sports or is it not sports?

17 A. -- there's 50 different sports, so --

18 Q. Is it sports or not sports?

19 A. It's not live team sports, but it's --

20 Q. But it's --

21 A. -- tennis is a sport.

22 Q. Tennis is a sport, but you wouldn't
23 consider it live team sports?

24 A. That's correct.

25 Q. All right. Would you consider the

1 Olympics live team sports?

2 A. No.

3 Q. All right. Now, let's move to
4 paragraph 3 of your direct testimony. And
5 that's on page 1.

6 A. Okay.

7 Q. So about two-thirds of the way down,
8 you're talking about your experience at
9 DirecTV, and you say that you were "responsible
10 for DirecTV's program acquisition activities
11 with respect to all general entertainment and
12 premium cable networks, as well as initiatives
13 such as video-on-demand programming and the
14 development of DirecTV's TV Everywhere
15 platform."

16 Is that correct?

17 A. Yes.

18 Q. So did you also -- were you also
19 responsible for programming selections with
20 regard to distant signals while at DirecTV?

21 A. Yes, so that, when I was senior vice
22 president during that period of 2007 through
23 2013, the group that I -- there was an entire
24 group of -- of folks that negotiated our local
25 station and distant carriage. And they all

1 reported in to me.

2 Q. They reported to you?

3 A. Yes.

4 Q. And were you involved in those
5 decisions?

6 A. I was -- yes, for the -- yes, I was
7 involved in -- in the bigger local station
8 deals, and I was definitely involved in the
9 distant signal carriage deals.

10 Q. Involved as in you participated or you
11 just approved what the team under you --

12 A. Both. I mean, if it was a -- there
13 wasn't a lot of distant signal carriage, other
14 than WGNA, and unless you're talking about the
15 big four broadcast networks, so by the time I
16 came in and took over the group, there wasn't
17 really, to my knowledge, a lot of new distant
18 networks being launched.

19 Q. So did that analysis that you would do
20 in deciding to carry -- well, really everything
21 you did but also, in particular, distant
22 broadcast stations, did that include an
23 analysis or review of Nielsen viewing
24 information?

25 A. No, it didn't.

1 Q. Nielsen ratings information?

2 A. No. I mean, again, there -- there --
3 the -- well, when I was -- when the group was
4 reporting in to me, there was, again, very few
5 -- if you look at the statement of accounts
6 that DirecTV filed with the Copyright Office,
7 you have WGNA, which is this huge chunk, and
8 then you have the big four broadcast networks,
9 affiliates of the big four broadcast networks,
10 for instance, maybe New York and L.A. stations,
11 which is another decent size chunk, and kind of
12 independent distants are -- were just a very
13 small part of that.

14 So I don't -- but to answer your
15 question, no, I don't recall that we ever
16 looked at, you know, ratings would have made a
17 difference. It was really about getting big
18 four broadcast networks into a market.

19 Q. So -- and you mentioned statements of
20 account. Did you prepare the statements of
21 account for DirecTV?

22 A. I did not. We had an accounting group
23 that would have prepared those.

24 Q. Did you review them as a part of your
25 work at DirecTV?

1 A. Yes.

2 Q. So you would review them before they
3 went out or just in the course of -- you said
4 the Accounting Department.

5 A. The Accounting Department would bring
6 to me and we would just run through them and I
7 would sign them.

8 Q. You would sign them, but you would
9 review them first or you would just accept that
10 --

11 A. They would basically do a quick
12 walk-through with me, but I did not review them
13 station by station or, you know, subscriber
14 detail or anything like that.

15 Q. Right.

16 A. They had all the records so I trusted
17 them.

18 Q. So, Mr. Hartman, when you were working
19 at DirecTV, did you work with a person named
20 Toby Berlin?

21 A. Yes, I did.

22 Q. Ms. Berlin also worked at DirecTV from
23 1998 to 2013; is that correct?

24 A. She did. And she reported to me for
25 several of those years in the end.

1 Q. Ms. Berlin was a vice president of
2 programming acquisitions?

3 A. Correct.

4 Q. Was she a part of the team that you
5 were describing that worked under your
6 direction?

7 A. She was part of the team -- the local
8 channel team or --

9 Q. Well, you tell me.

10 A. Yeah. Okay. So she was involved in
11 local channel launches, I think back in the
12 early days, you know, around the early 2000s, I
13 think, and then segued into different areas.
14 So when she was reporting to me, she was
15 working on -- she would negotiate our adult
16 programming deals. She negotiated our airborne
17 deals, she negotiated our Pay Per View
18 contracts, boxing and wrestling. She worked on
19 ethnic platform. I think that was about it.

20 Q. And she also was involved with distant
21 signals as well, was she not?

22 A. Not when she was reporting to me, no.

23 Q. Not when she was reporting to you?

24 A. No. That all came through the
25 station -- the local station group, which

1 reported in to me, she was not a part of.

2 Q. But she -- so are you aware that she
3 has testified here in proceedings --

4 A. Yes.

5 Q. -- before the Copyright Royalty
6 Judges?

7 A. Yes.

8 Q. Have you reviewed her testimony?

9 A. I have.

10 Q. All right. Let's take a look at her
11 testimony. So if you --

12 MR. PLOVNICK: Oh, and before we do
13 that, Your Honor, as a housekeeping matter, I
14 understand that all the parties have agreed to
15 stipulate to the admission of MPAA Exhibits
16 6041 through 6044, inclusive. And I would move
17 their admission before we actually start
18 looking at them.

19 JUDGE BARNETT: Hearing no objection,
20 6041 through 60 -- did you say 44?

21 MS. PLOVNICK: 44, yes, Your Honor.

22 JUDGE BARNETT: Inclusive, are
23 admitted.

24 (Exhibit Numbers 6041, 6042, 6043,
25 6044 were marked and received into evidence.)

1 BY MS. PLOVNICK:

2 Q. So take a look at Exhibit 6041, which
3 is which is the written direct testimony of
4 Toby Berlin from the 2004 through 2009 cable
5 and 1999 through 2009 satellite Phase II
6 proceeding.

7 A. Okay.

8 Q. Do you see that?

9 A. Yes, I see that -- yes, the front page
10 here, yes.

11 Q. All right. And so if you turn to page
12 6 of that testimony, and you look under heading
13 D at the bottom of the page, and you see the
14 heading that says "importance of program
15 ratings"?

16 A. Um-hum.

17 Q. So if you just take a look -- and have
18 you had a chance to review this testimony?

19 A. I -- I did. Yes.

20 Q. So what Ms. Berlin says here, at the
21 bottom of page 6 and carrying over to page 7,
22 and I'll just, you know, read it, "In deciding
23 whether or not to carry that station on an out
24 of market basis, we would look at ratings, just
25 like our cable competitors. Our marketing and

1 business analytics departments would supply a
2 list of stations in a DMA with their Nielsen
3 ratings. If a station had high ratings, and
4 cable had it or we believed it would bolster
5 our line-up because it had high ratings, we
6 would carry the station out of market and pay
7 copyright royalties. Ratings were the single
8 most significant factor that the business team
9 considered when evaluating new programming
10 acquisition opportunities. The Nielsen ratings
11 and other audience measurement tools play a
12 pivotal role in determining the true value of a
13 signal and its constituent programs. This is
14 consistent with the very simple paradigm that
15 satellite operators value programs that people
16 watch and do not value programs that people do
17 not watch. Based on my years of experience in
18 the subscription television industry, I would
19 say other satellite service providers and cable
20 operators all viewed ratings as a principal
21 measure of value within a defined genre of
22 programming."

23 So would you agree or disagree with
24 Ms. Berlin's testimony?

25 A. I would disagree with that.

1 Q. You would disagree?

2 A. Yes. I think that you can look at it
3 from two different perspectives, as I was
4 reading through it. And one is just when
5 you're talking about distant signals -- and I
6 can speak to the period, you know, from about
7 2007 or so on when, again, the station group
8 reported in to me and we did not use ratings
9 for distant signals. Again, any market that we
10 were bringing distant signals in, it was
11 basically trying to get the big four networks,
12 which is what were most important to the
13 customers.

14 You know, I can't speak to when she
15 was -- the early, I guess, 2000s, I wasn't part
16 of that group then, but, again -- and I read
17 her example of trying to, I think, bring in
18 signal from San Diego into L.A. or vice versa,
19 and, I mean, I guess just speaking from I was
20 at the company then and I was involved in
21 obviously the -- just in knowing kind of how
22 the company worked, I just think that any
23 distant signals brought in that weren't a big
24 four affiliate were really around the edges.
25 And I don't know that ratings would have

1 mattered.

2 But I can speak more generally too. I
3 would like to speak more generally because I
4 think she's -- she was not involved -- the
5 types of programming she worked on for most of
6 the time she was at DirecTV, most of it didn't
7 even involve seeing ratings. I mean, Pay Per
8 View events, she worked on the music channels,
9 she worked on, again, adult. A lot of the
10 ethnic programming is Pay Per View packages.

11 So she would not have been -- you
12 know, I think I can speak much better to the
13 fact of whether or not we used ratings overall,
14 you know, in the general platform and
15 negotiations and decisions, and I can say that
16 there were -- again, as I said in my testimony
17 yesterday, they were -- you know, they just
18 really not determinative. We definitely looked
19 at them but --

20 Q. Well, so -- so from reviewing
21 Ms. Berlin's testimony, it's clear that ratings
22 were important to her.

23 A. I can't speak for her. I can only
24 speak for the fact that, you know, I was the
25 head -- I ran the programming group and --

1 Q. So is it fair to say that within a
2 single organization like DirecTV, that
3 different individuals have different opinions
4 about what's important in their
5 decision-making?

6 A. Again, I can't speak to her. Maybe
7 she does have a different opinion. I --

8 Q. Well, she clearly does.

9 A. She reported in to me for a long
10 period of the time while I was a senior vice
11 president there. And I -- I don't recall her
12 ever coming to me and bringing ratings and
13 saying this makes a difference or -- I don't
14 know how she would have necessarily used these
15 ratings. So, I --

16 Q. You don't --

17 JUDGE FEDER: Excuse me.

18 THE WITNESS: Sure.

19 JUDGE FEDER: Mr. Hartman, a moment
20 ago you said "around the edges." What do you
21 mean by that?

22 THE WITNESS: Oh, I think it's -- I
23 mean, I think maybe -- and I was trying to
24 understand -- like I said, I have to admit I
25 didn't quite really understand her example.

1 She didn't give certain -- she didn't give a
2 specific station to say we launched KQED or
3 something because, you know -- or we brought it
4 in distantly because it was important.

5 I was -- I was thinking that maybe she
6 was talking more about maybe devotional or
7 other types of programming, that, you know, may
8 have been kind of a one-off. Like maybe it's
9 worth it to bring in this one distant signal
10 because maybe it does serve a particular niche.
11 But I don't think -- again, I think that was
12 just around the edges. It wasn't like we were
13 doing that in multiple markets as I understand
14 it.

15 BY MS. PLOVNICK:

16 Q. All right. So -- but you don't know
17 what Ms. Berlin considered or didn't consider
18 in her programming decisions?

19 A. Well, again, I'm trying to think how
20 she would have used ratings for the types of
21 work she worked on when she was reporting to
22 me. It wouldn't have -- it wouldn't have
23 factored in. And she wouldn't have been in --
24 she was never in any negotiations for the
25 general market platform, all the deals I worked

1 on, which is, you know, the vast majority of
2 the programming. So I'm not sure, you know --
3 again, I can't speak for her, but I can only
4 speak for my experience as running the
5 programming group.

6 Q. Right. You speak from your
7 experience, but she clearly has a different
8 view of what's important than you do.

9 A. She -- her testimony says that.

10 Q. All right. If we look in the next
11 paragraph of her testimony, she says, "One
12 reason ratings are crucial is because it is
13 difficult to discontinue a channel after a
14 commitment has been made to include it. Once a
15 decision was made to carry a station out of
16 market, DirecTV rarely, if ever, pulled it from
17 the DMA, unless that DMA became 'served' or if
18 that network's station launched in the DMA.
19 The reason we never pulled a station once
20 launched is that every station had some local
21 constituency, usually" --

22 JUDGE STRICKLER: Loyal, loyal
23 constituency?

24 MS. PLOVNICK: I'm sorry -- loyal
25 constituency -- you're right, Your Honor.

1 BY MS. PLOVNICK:

2 Q. -- "loyal constituency, usually a
3 niche audience. However small it might be, we
4 never wanted to have subscribers retaliate by
5 'churning' off the platform or discontinuing
6 service. So it was a common practice of
7 DirecTV that once a station's carriage
8 commenced, the signal rarely went dark or was
9 pulled off the air."

10 Would you agree with that testimony of
11 Ms. Berlin?

12 A. Well, no. I mean, I don't -- I do --
13 you know, I think you can look at the history
14 of DirecTV, and probably cable as well, and
15 it's not commonplace for cable networks or
16 stations to be pulled. I mean, it is a last
17 resort.

18 It's happening more and more with
19 broadcasts with the station groups, because the
20 fees they are asking for are so high. You
21 know, we did drop networks. I think that, you
22 know, usually when you're coming down to the
23 wire in a negotiation, last week or two, and
24 you see the crawls on screen and you see people
25 messaging about losing channels, it really does

1 bring the parties to the table.

2 But I wouldn't agree -- you know, I
3 worked on our Viacom deal in 2012 where we
4 dropped 14 Viacom channels for about two weeks
5 just because of the deal there. So, you know,
6 I do -- it's not -- you don't relish pulling
7 programming, but I think when you have to look
8 at the decision for pulling programming, you
9 know, the biggest factor is are you going to
10 lose customers?

11 And I think that, you know, in my
12 testimony yesterday, live sports was the most
13 important -- was the category we were most
14 worried about if we had to drop.

15 Q. Dropping a channel -- the reason you
16 would not drop a channel you carry along for a
17 long period of time was because you were afraid
18 that you would lose customers?

19 A. Well, no. I think it's just a matter
20 of degrees. So I think that, yes, every
21 channel, you could -- yes, every channel has
22 somebody, it's somebody's favorite. DirecTV
23 had 20 million customers so you're going to
24 find somebody that -- but I think that when you
25 made the decision -- when we discussed

1 decisions to drop -- again, this is just
2 another point, that ratings never factored into
3 that decision.

4 The last couple of weeks we were
5 polling customers, we were kind of trying to
6 run numbers as to, okay, you know, is this
7 programming so important that we're going to
8 lose customers quickly? Do they have other
9 alternates? So if it's a movie channel, we can
10 just, you know, tell them to go watch -- you
11 know, there's other -- five other movie
12 channels on DirecTV, so you'll find a
13 substitute with -- again, live sports, that was
14 our biggest category that we were most worried
15 about dropping.

16 Q. But you agree with Ms. Berlin that you
17 would rarely, if ever, drop a station if you
18 could help it?

19 A. Yes, we -- the goal was always to
20 reach a deal with every programmer.

21 Q. Would you describe continuing to carry
22 these signals as legacy carriage?

23 A. No, because I think every time a deal
24 came up, you know, whether it be four, five,
25 six years, there was a review of the value of

1 the network and whether or not it made sense to
2 keep on the platform.

3 Q. And you usually decided it made sense
4 to keep the same signals on the platform if you
5 could?

6 A. Well, I mean, I guess if you're asking
7 if we dropped a lot of networks, no, we didn't.
8 But every -- every channel was examined every
9 time it came up for renewal.

10 So if the value equation wasn't there,
11 then we would become much tougher in our
12 negotiation. And then we would usually reach a
13 deal and it was -- then it would be more
14 favorable to us.

15 Q. The goal was to reach a deal to
16 maintain the same carriage because the
17 subscribers would not be happy if they didn't
18 continue to get the signals that they cared
19 about?

20 A. Yes, it's a matter of degrees, like I
21 said. You know, every channel has somebody,
22 it's somebody's favorite. So the goal, of
23 course, was to keep as much programming on the
24 platform as we could because, yes, that is the
25 way to keep customers happy.

1 Q. All right. So let's just switch gears
2 for a little bit.

3 And, Dima, you can take that off.

4 Let's just talk a little bit about
5 programming decisions in general. So -- and I
6 think you testified that when a satellite
7 carrier makes a programming decision, it's
8 usually about whether to carry a whole station
9 or a whole cable network. You're not usually
10 selecting individual programs or categories of
11 programs. Is that correct?

12 A. Yes. Our negotiations for -- if
13 you're asking about, yes, the negotiations at
14 DirectTV are generally for linear channels.

15 Q. And sometimes you would purchase
16 multiple signals or networks in a package or
17 bundle; is that correct as well?

18 A. Yes, from the same content owner?

19 Q. Yes.

20 A. Yes.

21 Q. So --

22 JUDGE STRICKLER: Excuse me, counsel.

23 I don't want to lose the thread, going back.

24 THE WITNESS: Sure.

25 JUDGE STRICKLER: Good morning, sir.

1 THE WITNESS: Good morning.

2 JUDGE STRICKLER: You said that -- in
3 response to counsel's question a moment ago,
4 that every station would come up for renewal
5 over a period of time. And when they would,
6 you would review the station and you'd either
7 decide whether or not you wanted to drop it,
8 whether you wanted to keep it, or maybe be
9 tougher in negotiations because you thought you
10 had a better bargaining position.

11 What would make a station weaker such
12 that you would negotiate for -- you would
13 negotiate and seek lower -- to pay lower rates?

14 THE WITNESS: I think that if -- if
15 they had lost certain product. You know, I
16 could use general entertainment or sports. You
17 know, if they had a couple of big shows that
18 had been fan favorites or something, you know,
19 like a Mad Men or something or Walking Dead,
20 and they lost that programming, I think that
21 would make their leverage weaker. If they had
22 lost a major team, if they were a sports
23 network, that would clearly factor into our
24 evaluation.

25 It really came down to whether or

1 not -- again, we did a lot -- we tried to do a
2 lot of analysis as to how long can we be off
3 with this network and not suffer the
4 consequences of losing customers?

5 JUDGE STRICKLER: When you would
6 decide whether to negotiate to pay a lower rate
7 or to -- whether to drop the station, did you
8 look at whether or not people were actually
9 watching programs on the station?

10 THE WITNESS: I would do an initial
11 analysis. I think, like I said yesterday, I
12 would look back over historicals and just to
13 see -- just as they would come in and tout, you
14 know, they could slice and dice it any way they
15 wanted, their prime time on Tuesdays was up
16 20 percent or something, you know, I could walk
17 in and say: Well, overall, I think your
18 ratings are down a little bit here and there.

19 But in the end, you know, I think it
20 was kind of used as an initial -- you know,
21 initial tactic in kind of starting negotiations
22 and, you know, you kind of -- as we're all
23 gathering 50 pieces of information to go
24 negotiate with. But when push came to shove,
25 again, ratings didn't really -- we would look

1 much more at kind of how important that
2 programming was. And, again, to me it was just
3 how quickly our customers are going to leave
4 the platform.

5 JUDGE STRICKLER: In your answer you
6 mentioned in the beginning of the negotiations
7 you would talk to the station representatives
8 about, well, your prime times, is the
9 expression I think you used --

10 THE WITNESS: Yeah.

11 JUDGE STRICKLER: -- your prime times
12 are up or prime times are down. By "prime
13 times," were you referring to your ratings in
14 prime time?

15 THE WITNESS: Oh, they -- so they
16 would come in and say -- you know, use AMC for
17 instance, they would come in and say, well --
18 they would ignore, obviously, ratings that
19 didn't favor them, but they might come in and
20 say: Well, look, this program has -- it just
21 launched and it's now seeing, you know, 10 or
22 20 percent increases every year. Or --

23 JUDGE STRICKLER: So they would try to
24 push that the station was valuable and the
25 programming was valuable because the ratings

1 were high. And you, in the negotiations, at
2 times would push back and say: Well, maybe
3 that's not really so. And then you'd point to
4 the negative ratings that they were trying to
5 obscure or not emphasize?

6 THE WITNESS: Yeah, I mean, I think
7 that -- again, I think both parties looked at
8 it like -- you know, again, it's much more
9 important to the network because that's where
10 they make a lot of their money, is advertising
11 sales.

12 I think we both -- like I said, it
13 would be, you know, one of 25 things you would
14 use in your arsenal. But, again, when push
15 came to shove, the last X number of weeks or so
16 and these negotiations got very intense, always
17 went down to the 11th hour, it really came down
18 to, you know, the value equation. And we would
19 look at what -- you know, again, what would it
20 cost us in losing subscribers to lose this
21 content and whether we were at a rate that
22 could justify paying them.

23 JUDGE STRICKLER: Can we put
24 Ms. Berlin's testimony back up on the screen
25 for a moment if possible.

1 MS. PLOVNICK: Sure. And, Dima, if
2 you could please put it up.

3 JUDGE STRICKLER: The part that you
4 were -- yeah, that's it. Thank you. I don't
5 know what paragraph we were in or page number
6 we were on there.

7 MS. PLOVNICK: For the record, this is
8 page 7 of Exhibit 6041.

9 JUDGE STRICKLER: I think that's the
10 wrong one. Stop scrolling. You're making me
11 motion sick.

12 (Laughter.)

13 JUDGE STRICKLER: Thank you.

14 In her testimony, she says at the end
15 of a paragraph, I can't tell which one it is,
16 on page 7 I think, she says -- that is
17 Ms. Berlin, right? -- "Based on my years of
18 experience in the subscription television
19 industry, I would say other satellite service
20 providers and cable operators all viewed
21 ratings as principal measure of value within a
22 defined genre of programming."

23 I want to focus on that last phrase
24 there, "within a defined genre of programming."
25 Did you understand that once you had identified

1 a particular genre of programming that you
2 thought would round out the package of
3 programming in stations that you had, that you
4 would then be more -- at that point be more
5 interested than you were previously as to
6 ratings because once you know the genre you
7 want, you want a more popular version, a more
8 popular program within that genre?

9 THE WITNESS: Yeah, I'm trying to --
10 so I think that, you know, maybe she's again
11 getting back to the early days of before we had
12 launched most -- you know, the local markets
13 and whether -- again, whether she was looking
14 at bringing in distant signals for maybe even
15 ethnic variety or devotional programming,
16 religious programming.

17 And all things being equal, okay,
18 there are two networks we can bring in, we only
19 have room for one, which one do we think is,
20 you know, you know -- you know, again, I can't
21 speak to kind of what -- the work she did back
22 in the early 2000s. You know, I'll say now
23 that there's not a lot of new channel launches,
24 other than regional sports networks. I think
25 you could look at the DirecTV platform over the

1 last ten years and maybe there has been a
2 handful of non-sports networks launched. So
3 there's not a lot of -- you know, I think now
4 as, you know, the saturation of the market
5 happens not only with -- it has not only
6 happened with customers but with programming, I
7 think people basically are carrying everything
8 that's out there now.

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25 BY MS. PLOVNICK:

1 Q. Okay. You and Ms. Berlin both left
2 DirecTV in 2013; is that correct?

3 A. That's correct.

4 Q. Did you both leave for the same
5 reason?

6 A. No, I was burned out on the industry
7 so I took about a year and a half off and
8 traveled. I actually don't know the
9 circumstances behind hers. She left after I
10 did so I don't know the circumstances behind
11 her.

12 Q. She left after you did?

13 A. Yes.

14 Q. But in the same year?

15 A. Yes, I think that's right.

16 Q. So you both were at DirecTV from 1998
17 to 2013, the exact same years?

18 A. Yeah, I guess that's right.

19 Q. Okay. So let's talk a little bit
20 about the Bortz survey. I understand you
21 reviewed the Bortz survey for 2010 to 2013 --

22 A. Yes, I did.

23 Q. -- for your testimony in this
24 proceeding? Have you ever participated in a
25 Bortz survey during your time as a satellite

1 carrier?

2 A. In a Bortz survey, no.

3 Q. And do you know if Bortz surveys
4 satellite carriers?

5 A. I don't know that.

6 Q. All right. But you have never
7 participated -- because you're not a cable
8 operator, you've never participated in the
9 cable operator Bortz survey?

10 A. I have never participated in a Bortz
11 survey.

12 JUDGE STRICKLER: Have you
13 participated in any similar survey?

14 THE WITNESS: I would participate in
15 surveys that were -- not -- I wouldn't say
16 directly related to this survey or very similar
17 to this survey. I would participate in
18 surveys. A lot of time content companies would
19 kind of call around and survey all the
20 distributors anonymously, like a Disney or
21 Viacom, and ask about value of content and what
22 went into decision-making and other things, but
23 I did not participate in particular in a survey
24 that was very similar to this one, no.

25 JUDGE STRICKLER: Thank you.

1 BY MS. PLOVNICK:

2 Q. All right. So let's turn to page 5 of
3 your direct testimony, which is Exhibit 1010.
4 And at the bottom of that page, you report the
5 point estimates from the Bortz report; is that
6 correct?

7 A. That's correct.

8 Q. And those are literally copied and
9 pasted from the Bortz report?

10 A. Yes, that's correct.

11 Q. So now, is it your testimony that
12 these results reflect the market value of the
13 different categories of programs from -- that
14 were retransmitted on distant signals between
15 2010 and 2013?

16 A. Yes, I think they're consistent with
17 -- with how I would value them.

18 Q. You say they're consistent with how
19 you would value them. Is that market --

20 A. I mean, I could -- yes, they're
21 consistent. When I saw these numbers, I said,
22 you know, that just makes sense to me. It
23 seems consistent with how operator -- you know,
24 a MVPD executive would value these categories.

25 Q. So do you think that reflects the

1 market value of the programming categories or
2 your willingness to pay?

3 A. Well, no, I think it's the market --
4 you know, I think the question was relative
5 value. And so I think that's --

6 Q. Is relative value the same as market
7 value?

8 A. Relative value -- when I read the
9 questionnaire, I read it as when you're looking
10 at these categories of programming and you're
11 talking about distant signals, how -- you know,
12 what's the relative value of each category
13 versus the other category?

14 Q. And would you believe that to be
15 relative value within the market that existed
16 in 2010 through 2013?

17 A. Yeah, yes.

18 Q. So -- and that would be the regulated
19 market subject to the statutory licenses?

20 A. Well, I think that -- you're asking --
21 wait, I'm sorry, what are you asking?

22 Q. I'm saying so in -- you're talking
23 here -- you say this is a relative valuation
24 for 2010 through 2013.

25 A. Um-hum.

1 Q. And I said would that be the market
2 that existed that cable operators were in when
3 they made these valuations in 2010 through
4 2013? I believe you said yes.

5 And so I was saying -- asking you to
6 confirm that the market that existed between
7 2010 and 2013 was a regulated market, subject
8 to statutory licensing.

9 A. Well, but I do believe one of the
10 questions asked, you know, if you had to go out
11 and purchase this in the marketplace, what --
12 you know, what are the values you would give.

13 Q. Oh. Well, why don't we take a look.

14 A. Okay.

15 Q. Let's look at the Bortz report, which
16 is Exhibit 1001.

17 A. I mean, they're asking about the
18 specific distant networks that were listed in
19 the questionnaire.

20 Q. Correct. And if you flip to the back,
21 there's a bunch of questionnaires, actually, in
22 the back of the Bortz report. But we can just
23 pick one. Let's see.

24 I'm looking at -- I'm going to just
25 look at Question 4a in one of those

1 questionnaires. So let me find one to point
2 you to. I'm looking at -- well, I think the
3 one they put up on the screen is C-14. We can
4 use the one that's on the screen just to make
5 it fast and easy for everybody here.

6 Actually, this is a WGNA-only one, so
7 we want one that's not WGNA-only, in case the
8 language is different, because most of the --
9 would you agree that there are more WGNA
10 systems that are not just WGNA-only than
11 WGNA-only systems?

12 A. I'm sorry, WGNA carrying --

13 Q. Carrying WGNA as one of multiple
14 signals, rather than being a WGNA-only system.
15 Would you agree that there are more cable
16 systems that carry multiple signals, rather
17 than just WGNA-only?

18 A. Oh, I didn't look at all the --

19 Q. You didn't --

20 A. -- statement of accounts for cable --

21 Q. Okay.

22 A. -- so I can't speak to that.

23 Q. Okay. Well, let's just -- how about
24 -- let's look at B-20.

25 A. Okay.

1 Q. That's the one that's on here. So
2 this is Question 4a from the Bortz survey.

3 MR. CANTOR: Excuse me. Could you
4 just make available for him the full version of
5 the survey that you're talking about?

6 MS. PLOVNICK: Sure. I've got it
7 right here, actually, if I may approach the
8 witness. I think it's probably also in one of
9 the mini-binders over there. May I approach?

10 JUDGE BARNETT: You may.

11 BY MS. PLOVNICK:

12 Q. All right. This is a copy of
13 Exhibit 1001, in case you would like to look at
14 any other page of it. But I'm really simply
15 looking at Question 4a, so that you can
16 understand what the language was because I
17 think that you were trying to remember it off
18 the top of your head.

19 So in Question 4a, it says, "Now, I
20 would like you to estimate the relative value
21 to your cable system of each category of
22 programming actually broadcast by the stations
23 I mentioned during" -- and they say the year --
24 "excluding any national network programming
25 from ABC, CBS, and NBC."

1 A. I'm sorry, let me -- okay, I'll look
2 here. I'm in the WGNA one.

3 Q. I think we're on page B-20. That's in
4 the back in the appendices.

5 A. Okay.

6 Q. It says "relative value to your cable
7 system of each category of programming actually
8 broadcast by the stations I mentioned during"
9 -- and this one it says 2013 -- "excluding any
10 national network programming from ABC, CBS, and
11 NBC."

12 A. Um-hum.

13 Q. So my question is, is this the --
14 asking for a relative valuation based on the
15 market as it existed in 2010 through 2013,
16 which would be the regulated market?

17 A. Well, I think that, yeah, I mean, it's
18 asking you to value the programming on --
19 again, on the stations they were carried, the
20 distant signals, correct? But I think that --

21 Q. The distant signals that were carried?

22 A. Yes. But I think that -- and so I
23 think you're talking about specifically with
24 respect to the program that's on these distant
25 signals, but I think your -- you know, my

1 experience in negotiating for types of content
2 would help me evaluate the types of content
3 that were on these distant signals.

4 Q. So you're saying that you wouldn't be
5 limiting it to distant signals, if you were to
6 be asked this question?

7 A. Well, no. I would look at what
8 programming was on the distant signal and I
9 would say, you know, clearly that if I was
10 bringing the distant signal in, I'm assuming it
11 was because of a certain type of programming on
12 that signal that I was looking for something --
13 there's a reason I'm bringing that distant
14 signal in.

15 And so I would -- you know, so I would
16 look at whatever the signals were and -- you
17 know, and figure out, okay, well, how important
18 was that type of programming for me to bring in
19 on this distant signal.

20 Q. So you would limit it to the signals;
21 you wouldn't be considering other kinds of
22 programming?

23 A. Well, I think you would look, I
24 guess -- you know, I would look at what the
25 content that was on the distant signal. Again,

1 I'm bringing it in for a reason, so -- and
2 then --

3 Q. And is it your testimony you would
4 consider other factors outside of distant
5 signals? Or that you would limit your
6 consideration to the value of the programming
7 on the distant signals?

8 A. Well, I'm looking at the distant
9 signals. So I'm evaluating the content that's
10 on the distant signals.

11 Q. So you would evaluate the content on
12 the distant signals and you would limit your
13 consideration to the value of the content on
14 the distant signals?

15 A. Yes, that's correct, although, like I
16 said, at some point, you know, you do know the
17 value of content because of all the -- you
18 know, you're a professional in the industry.

19 Q. And you would be -- you would, just to
20 bring it -- just to clarify what you were
21 saying, so you would be focused on the content
22 on the distant signals that you were carrying
23 subject to the statutory license in the
24 relevant royalty years as considering Question
25 4a?

1 A. The survey to me was asking what --
2 I'm reading -- I'm looking at the distant
3 signals that I carry. And what is the -- you
4 know, obviously like I said, if I have a fixed
5 dollar amount to spend, a budget to spend, to
6 acquire the non-network programming on those,
7 you know, on that -- on the programming that's
8 on these distant signals -- this, I think, asks
9 for a percentage, right, the percentage of the
10 fixed dollar amount -- so I've got a fixed
11 dollar amount. How much am I going to allocate
12 to sports?

13 So I would look at the stations that
14 I've carried and say, okay, well, you know,
15 given these, I think that, you know, X percent
16 is a fair value. That's what I would value,
17 the relative value of sports versus the other
18 content that would be appearing on these
19 distant signals.

20 JUDGE STRICKLER: When you would make
21 that analysis as you're going through that in
22 your answer, would you consider how much in the
23 way of sports you already have in your line-up
24 on other channels and say, for example -- I'm
25 not saying this is the case, but

1 hypothetically -- well, we've already -- we
2 think we've exhausted the sports enthusiast who
3 is going to subscribe, so sports, while it may
4 be the biggest overall driver of what we have,
5 we've so successfully tapped into that market
6 that we don't need to tap -- you know, getting
7 the Cubs, the White Sox, and the Bulls, three
8 out-of-market teams on a distantly
9 retransmitted station is not that big a deal.

10 So sports on the margin now, now that
11 we're -- that you're looking at a distantly
12 retransmitted station, isn't as big a driver as
13 it otherwise would be when you're first
14 creating your overall line-up of stations and
15 networks?

16 THE WITNESS: I guess, you know, I
17 think that -- I guess if you use WGNA as an
18 example, we saw -- you know, DirecTV clearly
19 saw value in live team sports programming,
20 locally, nationally. You know, ESPN is a
21 national sports network.

22 I don't think -- you know, it's --
23 satellite and cable do work differently as far
24 as how they can import distant signals. And so
25 as I understand it, cable can bring in distant

1 signals without permission into a launched
2 market where satellite can't.

3 And so I think they may have made a
4 determination for bringing, say, a Fox station
5 in that I can get a regional game that's not
6 available in my local Fox or something. So,
7 you know, if you're bringing in a distant
8 station from a neighboring market and it has
9 got the same sports, maybe the value isn't
10 there, because you're seeing the exact same
11 programming, I will say for something like WGN,
12 we really did see -- you know, we launched the
13 WGNA before we launched the Tribune stations.
14 We saw value. We kept that because we saw the
15 value.

16 JUDGE STRICKLER: If you were
17 answering this survey, would you -- given how
18 important sports is in terms of subscribership,
19 would you give 100 percent to sports and zero
20 to the other categories?

21 THE WITNESS: No, because I think that
22 you -- you know, I think, again, when you're
23 looking at the -- and, again, satellite does
24 work differently, but I imagine as a cable
25 operator if you're looking at the six different

1 stations you're carrying or whatever, you're --
2 again, you're bringing those distantly in for a
3 reason. So there's a type of programming on
4 there or whether it's, you know, a newscast or
5 some other type of local programming or sports
6 or something else that you find valuable.
7 But --

8 JUDGE STRICKLER: So there does come,
9 if you will, a saturation point even with
10 regard to the distantly retransmitted stations,
11 where you say enough with the sports already,
12 we can do better by having some other
13 programming type. Sports may be 50, 60,
14 70 percent, whatever number you might choose as
15 the percent in this constant sum survey, but at
16 some point you're going to say that's enough,
17 let's move into some other niche or programming
18 category that will better serve our bottom
19 line?

20 THE WITNESS: I mean, I think you
21 could say that probably with the general market
22 and I assume distant signals as well, that you
23 want to serve as many customers, as many bases,
24 your whole customer base. And that would
25 include trying to provide as much content as

1 you can from all genres.

2 JUDGE STRICKLER: Which goes back to
3 my first question. So if you already had a
4 channel and station network line-up before you
5 started looking at the distantly retransmitted
6 stations, you would on the margin add sports or
7 not add sports in part based on how much you
8 had in the way of sports already; isn't that a
9 fair statement?

10 THE WITNESS: I guess if you're
11 looking at -- I guess I separate out
12 super-stations and local -- and distant, you
13 know, distant stations and bringing in a
14 neighboring signal from another market.

15 And like I said, I guess -- you know,
16 if your question is would I see value in
17 bringing in a distant Fox if I've already got
18 the Fox and it has got all the same programming
19 on it, you know, I'm not getting a different
20 game of sports, yeah, maybe I don't know that I
21 would see the value there, but I think -- I'm
22 sorry if I'm not --

23 JUDGE STRICKLER: No, you're
24 answering.

25 THE WITNESS: Okay.

1 JUDGE STRICKLER: But what if it's --
2 what if it's a different team? I mean, in the
3 local market, if it was the New York market,
4 say you already had the Knicks and the Nets, so
5 you had basketball and you had other basketball
6 on the super-stations.

7 THE WITNESS: Um-hum.

8 JUDGE STRICKLER: Would that -- would
9 you consider whether or not there would be
10 sufficient value added by importing a station
11 because it had the Chicago Bulls?

12 THE WITNESS: Yes, I would --

13 JUDGE STRICKLER: When that market
14 already had a lot of basketball?

15 THE WITNESS: Oh, no, because I don't
16 think -- no, I actually -- I think I understand
17 your question now. I think that I guess, you
18 know, when you talk about -- you know, I know
19 at some point you talk about the passion of the
20 fans.

21 I think you've got, you know, a large
22 base of sports fans that are pretty passionate.
23 And they'll watch, you know, sports when it's
24 on. That's why ESPN has Sports Center. And
25 then you clearly have your local teams that are

1 -- that serve a local audience.

2 But there are a number of teams that I
3 would be interested in bringing nationally, if
4 I could, that just the rights don't allow you
5 to do that. The Cubs, you know, WGNA, because
6 of the super-station, we were allowed to serve
7 an entire national audience and that was
8 important to us. I'm not saying everybody is a
9 Cubs fan, but for the rate they were paying --

10 JUDGE BARNETT: They're not?

11 (Laughter.)

12 THE WITNESS: I grew up in Pittsburgh
13 so --

14 JUDGE STRICKLER: You can be an
15 anti-fan too and hate the team and hope to
16 watch them lose.

17 THE WITNESS: Well, true, true. No,
18 but I do think you also get a -- you know,
19 there's certainly a level of fan that --
20 nationally that want to see all the games.
21 There's also a level of fan that just will
22 watch a national game if it's on. Maybe a more
23 casual sports fan.

24 But, you know, specifically with
25 respect to super-stations, no, I mean, I will

1 tell you I was involved in the decision, we saw
2 the value of every time it came up for renewal.

3 JUDGE STRICKLER: Thank you.

4 BY MS. PLOVNICK:

5 Q. So in the course of your answers to
6 Judge Strickler's questions, you said "I
7 assume," "I imagine." And this is because
8 you're not actually a cable operator, correct,
9 so you're having to make assumptions about what
10 cable operators would do in this context?

11 Because your experience is --

12 A. I mean, I know a lot of folks in the
13 cable industry, so we speak about matters, but
14 I have never worked for a cable company.

15 Q. You never worked for a cable company.
16 You never responded to the Bortz survey?

17 A. That is correct.

18 Q. And so when you were answering some
19 questions on direct about Dr. Steckel and his
20 critique of the categories that are used in the
21 Bortz survey, and you said that you disagreed
22 with him that they would be confusing to cable
23 operators, this is based on your experience in
24 the satellite industry, not based on having
25 ever worked in the cable industry as a cable

1 operator?

2 A. It's my experience as an MVPD
3 executive, which I think covers both. We go
4 through the same analysis with respect to
5 programming and --

6 Q. That's your assumption based on your
7 satellite experience, not based on ever having
8 worked in the cable industry?

9 A. But based on knowing every -- all my
10 competitors and the folks that have my job at
11 all the major competitors, cable companies.
12 I --

13 Q. You're making assumptions about what
14 they would think or how they would answer these
15 questions?

16 A. I -- I -- from having -- obviously
17 from knowing a lot of people in the industry
18 and having conversations over the 15 years, I
19 know the importance of these categories of
20 programming to an executive.

21 Q. Based on --

22 A. But I cannot -- you're right.

23 Q. But you cannot speak for them or what
24 goes on in their minds or how they may or may
25 not have understood this?

1 A. That is -- yes, you are correct.

2 Q. Having never responded yourself. All
3 right.

4 Let's talk just for a minute about the
5 part of your rebuttal testimony that responds
6 to Mr. Mansell. And so now your rebuttal
7 testimony for the record is Allocation Hearing
8 Exhibit 1011. And the part of your rebuttal
9 testimony where you respond to Mr. Mansell I
10 think is pages 5 to 6; is that correct?

11 And now, Mr. Mansell's testimony is
12 Exhibit 6002. And we can pull it up and look
13 at it if you need to, Mr. Hartman, but I'll
14 represent to you -- and you can tell me if I'm
15 characterizing this correctly -- that
16 Mr. Mansell analyzed programming trends for JSC
17 programming over 30 years, and he concludes
18 that the number of professional live college
19 team sports games on local over-the-air
20 stations has significantly declined over that
21 time; while the number of games available
22 through other outlets, such as cable networks,
23 has increased. Oh, it looks like they already
24 put it up here.

25 So that's what Mr. Mansell says in his

1 testimony.

2 A. Okay.

3 Q. So they put up on the screen 6002,
4 which is Mr. Mansell's testimony.

5 A. Okay.

6 Q. That's what he says?

7 A. I've analyzed -- you're talking about
8 the first full paragraph?

9 Q. Yes.

10 A. Yes, that's what he says.

11 Q. All right. And so you testified
12 earlier this morning that you agreed with a lot
13 of what Mr. Mansell says about the emergence of
14 regional sports networks and changes in the
15 industry over the 30 years that he analyzed?

16 A. That's -- I did agree with his
17 testimony that there have been more and more
18 regional sports networks launching over the
19 last 15 or 20 years, yes.

20 Q. Now, in your rebuttal testimony, you
21 did an analysis focused on comparing the time
22 period 2004 to 2005 and 2010 through 2013, and
23 you just looked at changes over that period of
24 time; is that correct?

25 A. Are you talking about the charts with

1 respect to the carriage for --

2 Q. Yes, I'm talking about the charts on
3 page 5, 6, and 7 of your testimony.

4 A. Okay.

5 Q. Well -- and actually, if we look at
6 the first one, Table 1 -- and it's on page 5, I
7 think that's what on the screen right now --
8 this is actually you reporting an analysis that
9 someone else did, right? This is an analysis
10 that Dr. Israel did?

11 A. Yeah, that's correct.

12 Q. And Dr. Israel actually was just
13 reporting some numbers that other folks had
14 actually calculated; Mr. Ducey and
15 Dr. Crawford; is that correct?

16 A. That's correct.

17 Q. So do you know how Dr. Israel put this
18 table together?

19 A. Well, no, I know he reviewed the
20 testimony of Ducey and Crawford, but, no, I
21 took -- I trusted Dr. Israel as in his
22 position.

23 Q. And Dr. Israel said -- in your title
24 you say that this is weighted by subscribers.
25 Do you know if it's subscribers or subscriber

1 instances?

2 A. For which one? I'm sorry.

3 Q. The title to Table 1. It says Share
4 of Compensable Minutes by Claimant Group
5 Weighted by Subscribers.

6 Do you know if the weighting was done
7 by subscribers or subscriber instances? Or do
8 you even know what a subscriber instance --

9 A. Sorry, you're talking about subscriber
10 instances, people watching the number of --

11 Q. Right. Do you believe which it is?

12 A. Yeah, I don't.

13 Q. And did you analyze what Dr. Israel or
14 Mr. Ducey or Dr. Crawford relied on to come up
15 with these numbers?

16 A. No, I did not.

17 Q. All right. You just took them
18 verbatim as reported by Dr. Israel; is that
19 correct?

20 A. I read Dr. Israel's testimony and,
21 yes, I trusted Dr. Israel.

22 Q. And same for moving over here to page
23 6, 7, you have here some tables reporting JSC
24 telecasts on WGNA, Fox, and, carrying on into
25 page 7, these are Major League Baseball

1 telecasts on Fox, NFL telecasts on Fox.

2 These tables say underneath source,
3 Bortz Media compilation. Did you rely on
4 Mr. Trautman at Bortz to prepare these tables?

5 A. Well, he sent me the -- I got backup
6 with respect to these game numbers.

7 Q. So you actually reviewed the backup --

8 A. Yes.

9 Q. -- underlying these tables?

10 A. Yes, I did.

11 Q. And you focused, in those tables,
12 solely on WGNA and Fox, correct?

13 A. Yes, that's correct.

14 Q. You did not look at all other
15 stations?

16 A. I -- no, I think these were the --
17 when you look at, certainly with WGNA, it was,
18 you know, by far, I think, but certainly with
19 satellite and cable, the biggest revenue
20 source, I guess, for -- going into the
21 Copyright Office.

22 But if you're asking whether we looked
23 at 500 stations, not to my knowledge.

24 Q. But Mr. Mansell did not limit his
25 analysis to WGNA and Fox, did he?

1 A. I -- no, it does not appear that he
2 did. But, again, I think when you're looking
3 at -- for purposes of this hearing and what's
4 being compensated on, I think that these were
5 the important numbers to focus on.

6 Q. So you think that the Judges should
7 disregard all of the other distantly broadcast
8 stations out there that aren't Fox or WGNA?

9 A. Well, I don't know that -- you know,
10 without having seen all the -- I'm not sure how
11 many distant signals were carried that were
12 carrying sports at the time amongst --

13 Q. A lot more than Fox and WGNA. Let me
14 represent that to you. Do you trust that
15 representation?

16 A. I would have to look at the numbers.

17 Q. All right. Well, do you know how much
18 compensable programming was aired on WGNA?

19 A. Oh, it's mostly the sports. There
20 were some other programming, programs that were
21 compensable for WGNA.

22 Q. But it's a small number of minutes
23 total that are compensable on WGNA; is that
24 correct?

25 A. For which category? For which --

1 Q. For all categories. The vast majority
2 of the programming on WGNA is not compensable
3 in these proceedings. Is that correct?

4 A. With -- I have not reviewed that
5 material, but I know that a good portion of the
6 programming was not compensable but the sports
7 is what was compensable.

8 Q. But you haven't reviewed that
9 information about what was compensable and what
10 wasn't compensable on WGNA?

11 A. Well, I've seen -- yes, it has been a
12 while since I reviewed it, but I did review it,
13 yes.

14 Q. You reviewed it, but you don't recall?

15 A. I can't cite it to you.

16 Q. But you know it's a small amount?

17 A. I know that -- but I don't think for
18 purposes of this hearing, I guess, I'm not sure
19 what -- you know, the sports was compensable,
20 and I think that's what's the important part.

21 Q. Well, sports is not the only category
22 at issue in this proceeding, is it?

23 A. No, it's not.

24 Q. Yeah. So the other signals and the
25 other categories of programming are also

1 important to the Judges in their consideration,
2 are they not?

3 A. I'm sure they're looking at all the
4 stations, yes. And I guess if I could just say
5 one thing. I'm not sure for the period we're
6 talking about here that -- without seeing your
7 analysis, I'm not sure if the period 2010
8 through 2013 we're talking about here, I don't
9 know how many local stations we were talking
10 about that may have lost sports.

11 Q. May have launched sports?

12 A. Lost, lost.

13 Q. Lost sports?

14 A. Yes, lost. When he's doing his
15 analysis here, you know, I was really focusing
16 on the prior period and then the current period
17 that we're --

18 Q. You were focused on the '04-'05 period
19 versus the 2010 --

20 A. Well, the -- right, and the 2010 being
21 obviously the most important period.

22 Q. You didn't consider the entire period
23 that Mr. Mansell considered or all the stations
24 he considered?

25 A. Well, I considered -- my point was

1 that we're talking about the 2010 through 2013
2 period here for compensable purposes, so I
3 don't know. I don't have an analysis of how
4 many local stations lost sports during that
5 period.

6 Q. During 2010 through 2013?

7 A. Yes, which I think would be relevant.

8 Q. One more follow-up -- actually a
9 couple more follow-up questions.

10 In your testimony just in general, and
11 this is switching gears a bit, you mentioned
12 some -- HBO, ESPN, Disney, USA, different
13 things. These are all cable networks; is that
14 correct?

15 A. Yes, the ones you mentioned?

16 Q. Yes.

17 A. Yes.

18 Q. And the ones that -- I'm trying to
19 remember all the ones you said.

20 A. Yes, yes.

21 Q. Those are cable networks and they are
22 not distant broadcast signals?

23 A. They are not distant broadcast
24 signals.

25 Q. Or local broadcast signals. And one

1 other follow-up question just coming back to
2 the Bortz survey question very quickly.

3 Did you -- when you were asking -- the
4 hypothetical questions that Judge Strickler was
5 asking you about how you would have answered
6 Question 4a, what volume of programming, if
7 any, would you have had in mind in considering
8 those questions? If you were responding to the
9 Bortz survey and you were considering distant
10 signals and the different bundling type issues
11 that Judge Strickler was asking you about?

12 A. I'm sorry, I don't -- what do you mean
13 by volume?

14 Q. Would you have had any particular
15 volume of programming in mind when you were
16 evaluating and assigning value to the different
17 categories of programming?

18 A. Meaning would I -- if there was 100
19 hours of sports versus two hours of --

20 Q. Would you know any particular volume
21 or would you have had any particular volume in
22 mind for any particular category?

23 A. Well, I'm sorry, I was really having
24 trouble. You know, you're looking at the --
25 would I know every program that was on there

1 and what -- every program and what category it
2 fit into for every signal?

3 Q. I guess that's -- that's one way to
4 look at my question. Would you be thinking
5 about every one of the individual programs in
6 all of the signals or how much total those
7 comprise?

8 A. I guess I would look at -- you know,
9 again, you're bringing in a distant signal
10 because there's certain programming on that
11 signal that's important to you. So I would not
12 know every program that was on, I don't think,
13 that was on every distant signal that I
14 carried.

15 But if I'm importing something, I'm
16 probably importing it for a reason, so I would
17 probably know that -- kind of what was
18 important to me on that signal.

19 Q. And so you said you wouldn't know
20 every program. And you probably wouldn't know
21 the minutes of programming that they totalled,
22 how many minutes of each category of
23 programming?

24 A. I don't think anybody would know that
25 but -- yes.

1 Q. All right. Thank you.

2 MS. PLOVNICK: I have no further
3 questions, Your Honor.

4 JUDGE BARNETT: Thank you.

5 Mr. MacLean?

6 MR. MacLEAN: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. MacLEAN:

9 Q. Good morning, Mr. Hartman.

10 A. Good morning.

11 Q. I'm Matthew MacLean. I represent the
12 Settling Devotional Claimants.

13 A. Okay.

14 Q. I first want to ask something about --
15 about something you said about network
16 programming and your decision to retransmit
17 network programming. And I believe you said
18 that, aside from WGNA, this was some of the
19 programming that you retransmitted
20 predominantly?

21 A. On a distant network basis?

22 Q. Yes.

23 A. Yes.

24 Q. Could you explain why you would have
25 retransmitted network programming on a distant

1 network basis?

2 A. Oh, I'm sorry if I was speaking more
3 -- if I was misspeaking. What I meant was when
4 you looked at -- again, when you look through
5 other statement of accounts, the DirecTV
6 statement of accounts for the period we're
7 talking about here, and when it lists the
8 stations that we're paying on, you know, like I
9 said, WGN is obviously this huge tranche of
10 75 percent, and then you have, I guess I should
11 say network affiliated stations.

12 Q. Sure.

13 A. Maybe that's -- you know, so when we
14 were -- at the time when DirecTV was trying to
15 figure out how best to service our customers,
16 before we could launch every market, it was
17 important to have the -- what I would call the
18 big four broadcast networks in market, whether
19 it was an out-of-market signal or not, network
20 affiliates, because it carried the sports
21 programming, the prime time programming that
22 were important to customers.

23 I guess that's what I was getting at.
24 And that's the whole -- you know, that's the
25 vast majority of what we paid on, as I

1 understand it.

2 Q. And when you say prime time
3 programming, you're referring to basically
4 nationwide network programming?

5 A. Network -- the programming that comes
6 from the corporate level network, yes.

7 Q. In what kinds of markets would you be
8 retransmitting network programming on a distant
9 basis?

10 A. So I guess, like I was saying -- and
11 this is more in the early days because DirectTV
12 has launched pretty much every market now and
13 has for -- has been in most markets for at
14 least several years, probably eight or ten.

15 So if there was a market that DirectTV
16 had not launched yet, you know, pick a number,
17 200 markets, Burlingame, Iowa, or something, if
18 it did not have the capacity to launch, you
19 know -- just briefly, I don't know if you know,
20 with satellite it's launch one, launch all. So
21 if we launch a local station in a market, we've
22 got to launch all local stations under either
23 must-carry or retrans. So, obviously, we had
24 to be very careful about which markets we
25 launched because we were a satellite company,

1 we were using spot beam technology, which is
2 just very difficult to figure out and get, you
3 know, the number of stations you need into a
4 local market on a national -- using a national
5 satellite.

6 But, anyway, so the point would be
7 that when we were launching -- we were looking
8 at different markets and we were allowed to
9 bring in a distant signal, again, what was most
10 important to us were affiliates of the -- of
11 the big four broadcast networks.

12 So that initially I think was the New
13 York ABC, NBC, CBS, and Fox, and L.A. NBC, CBS,
14 ABC, and Fox.

15 Q. And that's because in a particular
16 market, if it didn't have its own local network
17 affiliate station, you would want to import a
18 station so that you'd have that network
19 programming?

20 A. No, there were two -- I guess you
21 could look at it -- again, it was so difficult,
22 sorry if it's kind of confusing, but because we
23 had used -- you know, cable is already
24 entrenched. They could launch every market.
25 They have a cable plant that you can just flip

1 a switch and you can launch 20 local channels.
2 Because DirecTV had to take its national
3 satellite capacity and try to figure out how to
4 get -- to launch, you know, 5 different
5 stations in this town, 20 different stations in
6 this town, it was a very slow roll-out process.

7 So there was no decision -- once we
8 launched a market, there was no decision; it
9 was we launched every channel, every local
10 station, excuse me, but until we launched a
11 market, in order to be competitive, it was most
12 important for us to carry -- again, these were
13 markets we hadn't launched any local station
14 yet, to carry affiliates of the big four
15 broadcast networks.

16 Q. Are there local markets that don't
17 have all four big four?

18 A. Yes.

19 Q. And in those markets that don't have
20 all four big four networks, is it important to
21 import a network channel?

22 A. Yes, to distantly import a -- yes.
23 You mean a Fox or an ABC? Yes.

24 Q. And in a DMA or in a market like that,
25 that doesn't have its own local ABC, NBC, CBS

1 station, is it -- is there value in importing
2 the network programming into that market?

3 A. So if there's a market that only has
4 three of the big four?

5 Q. Sure.

6 A. Yes, there is value in bringing in --
7 again, because, you know, for instance, sports,
8 if it's a Fox -- if we don't -- if a station --
9 if a small market did not have a Fox affiliate
10 for some reason, yes, it was very important to
11 bring in a national -- to bring in a Fox so
12 that they could see their football games.

13 Q. What are some characteristics of those
14 markets that don't have all four of the big
15 four network broadcast stations?

16 A. So some markets --

17 Q. Network affiliated?

18 A. So, yeah, so markets that don't have
19 -- that -- they would be -- I can't give you a
20 number. They would be very small markets. You
21 know, some of the major markets have -- L.A.,
22 for instance, has probably 20 or 30 local
23 stations. But a smaller market -- and I don't
24 know that there are that many, but they would
25 -- it would be a much smaller market, very

1 small market.

2 Q. Do markets like that tend to have
3 lower subscription fees on average?

4 A. No.

5 Q. Across the country?

6 A. No. I mean, our pricing, it's pretty
7 much -- except for some of the access fees,
8 it's pretty much national pricing that DirecTV
9 has. So, no --

10 Q. For DirecTV, it's national?

11 A. Yes, yes. So the fee, what you would
12 pay in a smaller market -- and there was
13 another reason too, because you wanted to -- if
14 your customer is paying the same price, you
15 really would like them to have the same
16 programming that everybody across the country
17 has.

18 Q. Shifting gears a little bit here, I'd
19 like to take a look at page 7 of your written
20 direct testimony. Focusing on paragraph 24,
21 you say you've reviewed the written testimony
22 from the 2004-2005 proceedings of Judith Meyka?

23 A. Um-hum.

24 Q. And that she testified as to the
25 importance of live sports programming to a

1 cable operator's programming line-up. So you
2 agreed with the testimony of Ms. Meyka?

3 A. Yes, I did.

4 Q. Do you know Ms. Meyka personally?

5 A. I do.

6 Q. You've never chastised her for
7 dishonesty?

8 A. For dishonesty, oh, no.

9 JUDGE STRICKLER: Try to think up your
10 own question.

11 (Laughter.)

12 THE WITNESS: Sorry. I just got what
13 I think you were saying. No, I'm friendly.
14 I've known her from the business for probably
15 10 or 15 years.

16 BY MR. MacLEAN:

17 Q. Okay. So I'm showing you here
18 Allocation Exhibit -- Hearing Exhibit 1037,
19 which is designated and is in evidence already.
20 And this is the testimony of Judith Meyka. Is
21 this the testimony that you reviewed?

22 A. Yes, it looks like it.

23 Q. Taking a looking at paragraph 27, and
24 I'm focusing here in the middle of the
25 paragraph, "live sports programming, local news

1 and public affairs programming and Public
2 Television programming are particularly
3 important components of the offering because
4 they bring unique content that may not be
5 available on other channels in the line-up."

6 Do you agree with Ms. Meyka on that
7 statement?

8 A. You know, I do think I will say that,
9 again, satellite and cable are different. And
10 so cable is more flexible in what they can
11 bring into a local market.

12 They can bring in -- if they've
13 already launched a market, they can bring in a
14 distant signal, and I don't know the rules
15 exactly, without getting permission of either
16 the stations in the market, if there's a
17 competing station. And satellite is just not
18 -- it doesn't have the same rules, but --
19 again, I would say that I think if you're
20 serving a market and you have capacity, you
21 know, again, I think it's just like the general
22 market platform. I think you do want to serve
23 as many customers with as much different
24 programming as you can.

25 Q. And live sports programming, local

1 news and public affairs programming and Public
2 Television programming are all important
3 components of that offering that you want to
4 give your subscribers?

5 A. They're different levels of value,
6 but, you know, again, every -- I think, most
7 genres of programming are important to the
8 platform. It's just a matter of degrees.

9 Q. And so looking at her footnote here,
10 footnote 3, and I am so glad that we got a
11 footnote here, "to a lesser extent" -- you
12 would agree -- "devotional and Canadian
13 programming also may also add a unique element
14 to the programming mix that might otherwise be
15 unavailable to a cable operator"?

16 A. I think this may have been where Toby
17 was going -- Ms. Berlin was going with her
18 testimony.

19 Q. This is Ms. Meyka's testimony.

20 A. No, but I'm saying -- I'm sorry. I'm
21 just -- I'm trying to make the point that I --
22 you know, again, that there's -- we do try to
23 serve as many -- with 20 million customers, we
24 try to serve as many customers, you know,
25 everybody's needs to the extent we had

1 capacity.

2 So I was only bringing up the
3 Ms. Berlin testimony because I think maybe this
4 is what she was getting at with her example of
5 the L.A. and New York, bringing in a distant
6 signal, that, you know, it was trying to serve
7 a niche.

8 It's -- you know, capacity is just
9 very tight. So, you know, we would try to
10 launch as many stations and cable networks as
11 we could to serve our customers within the
12 bounds of, you know, the value equation and the
13 capacity we had.

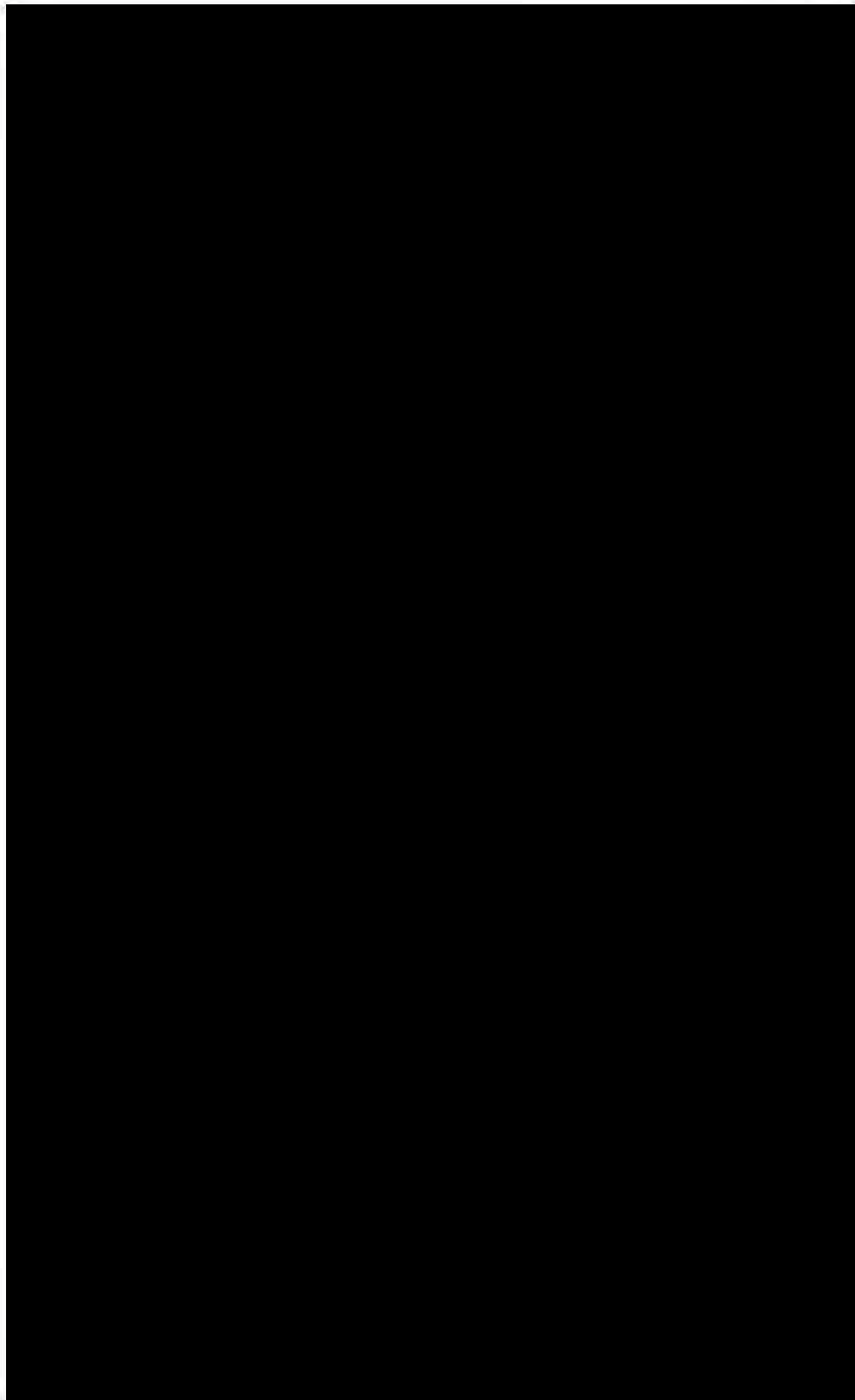
14 Q. And among those were devotional
15 programs to serve devotional customers?

16 A. I'm not aware of any devotional
17 programs that we -- networks, excuse me, that
18 we brought in on a distant basis, but it could
19 be the case. And, again, I can't speak to her
20 from a cable perspective. She might have a
21 different -- you know, slightly different view
22 based on the fact that they have more
23 flexibility in what they bring in.

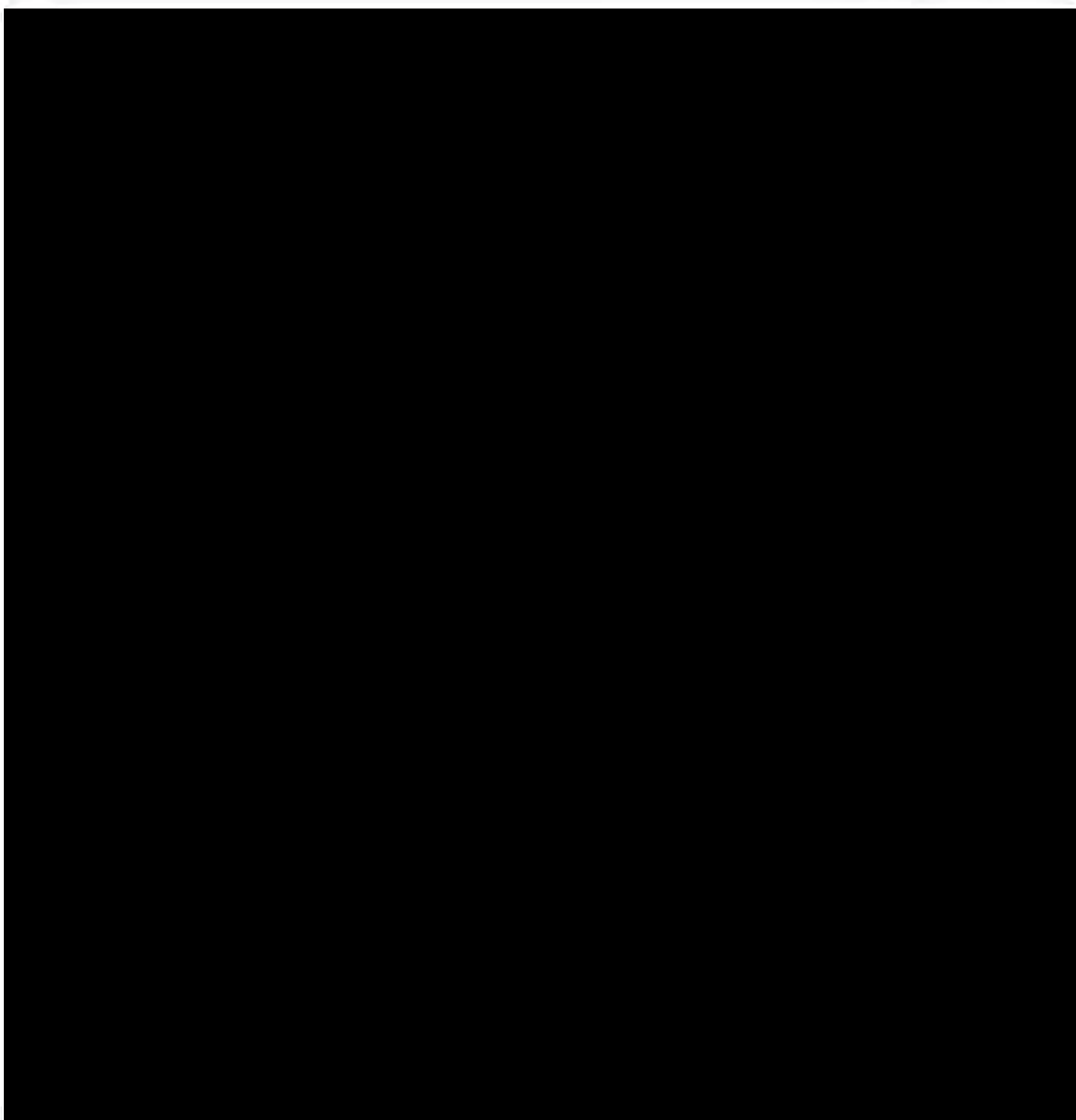
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19 BY MR. MacLEAN:

20 Q. Would you say that DirectTV valued its
21 religious customers?

22 A. I would say DirectTV valued every
23 single customer. So I think we --

24 Q. DirectTV at one point offered Easter
25 and Christmas specials from Crystal Cathedral

1 on a Pay Per View basis; is that right?

2 A. I think that is correct, yes.

3 Q. Would you regard that as devotional
4 programming?

5 A. I suppose so.

6 Q. DirecTV launched its own devotional
7 programming, including church services from
8 University of Notre Dame; is that right?

9 A. I think that's correct, yes.

10 Q. And these programs, DirecTV felt,
11 served an important niche audience; would you
12 agree with that?

13 A. I think that, again, there's -- you
14 could look at a multiple kind of diverse --
15 each audience we served. We, you know, had
16 packages of Italian programming. You know, we
17 served -- again, you could look at -- you could
18 probably slice and dice it numerous ways as to
19 the different types of programming -- customers
20 we served with our programming.

21 So, yes, I mean, devotional would be
22 one of the many kind of niches that we tried to
23 serve.

24 Q. You described sports programming as
25 high-value programming, right?

1 A. Um-hum.

2 Q. Right?

3 A. Um-hum.

4 Q. And you do have to answer yes or no
5 for the reporter.

6 A. Oh, yes. I'm sorry, yes.

7 Q. I'm sorry, that's --

8 A. Yeah.

9 Q. And that -- and I believe this is
10 because, in your words, folks are really
11 passionate about their particular sports teams;
12 would you agree with that?

13 A. I would agree with that.

14 Q. Many of these -- I mean, there are
15 some devoted fans of these sports teams, would
16 you agree?

17 A. Yes.

18 Q. They idolize their heroes?

19 A. That is correct.

20 Q. They -- some of them, I mean, they'll
21 watch these games religiously sometimes, right?

22 (Laughter.)

23 THE WITNESS: They're very passionate
24 about watching their games.

25 BY MR. MacLEAN:

1 Q. I don't -- I don't want to stretch
2 this, you know, analogy too far, but do you
3 know what Tebowing is?

4 A. I do.

5 Q. Could you explain?

6 A. Can I explain? As in taking a knee?

7 Q. In...

8 A. I don't know -- it has been a while.

9 Q. In prayer?

10 A. In prayer, yeah, I know he is -- he
11 was big a few years ago.

12 Q. Would you agree with me that there's
13 some people that are very passionate about
14 their religions?

15 A. Yes, I would say but as a matter of
16 degrees and, you know, I think if you're asking
17 whether or not I could value the types of
18 programming simply, I would not.

19 Q. I understand.

20 A. Yeah.

21 Q. But, I mean, there are people out
22 there who are passionate about their religion?

23 A. There are, and I think it's a matter
24 of if you're looking at kind of the whole, you
25 know, discussion we've had been having around

1 what's important to the customer, and, again,
2 we want to serve every customer. If, you know,
3 we lost certain networks, they would be less
4 detrimental to us than losing sports networks.
5 I consider sports at the top of networks that
6 we just couldn't lose because we would lose
7 customers. I'm not sure on the devotional side
8 if that's the case.

9 Q. Well, DirecTV carried religious
10 programming to serve religious customers,
11 right?

12 A. Yes.

13 Q. Are you aware that religious
14 programming is often similar to sports
15 broadcast live in the form of church services?

16 A. Yeah. Okay. I don't -- I'm sorry, I
17 don't watch a lot of devotional programming,
18 but, yes, I imagine they have services that are
19 broadcast live.

20 Q. And that's an opportunity similar to
21 feeling like you're there for a sports game, to
22 feeling like you're there, part of a religious
23 community in a church service?

24 A. For some small group of customers,
25 yes.

1 Q. So -- and, finally, I just want to
2 take a look at your testimony, page 5, where
3 you --

4 A. Direct or my rebuttal?

5 Q. This is your direct testimony, page 5,
6 where you refer to the Bortz results.

7 A. Um-hum. Yes.

8 Q. And you'll see, I mean, certainly, you
9 know, we're not at the top of the list here,
10 but devotional and religious programming has
11 Bortz results within the 4 to 5 percent range.
12 Do you see that?

13 A. Yes.

14 Q. In your experience as a system
15 operator, do you think that that's a reasonable
16 range for a valuation of religious programming?

17 A. Yes.

18 MR. MacLEAN: Thank you. I have no
19 further questions.

20 JUDGE BARNETT: Let's take our morning
21 recess, 15 minutes.

22 (A recess was taken at 10:27 a.m.,
23 after which the trial resumed at 10:48 a.m.)

24 JUDGE BARNETT: Please be seated.

25 Other cross-examination for Mr. Hartman?

1 No? Any redirect?

2 MR. CANTOR: No redirect, Your Honor.

3 JUDGE BARNETT: Well, thank you, Mr.

4 Hartman. If I had known that, I would have let
5 you go before the break.

6 THE WITNESS: No worries. I have all
7 day.

8 JUDGE BARNETT: Thank you.

9 THE WITNESS: Thank you, Your Honors.

10 JUDGE BARNETT: And our next witnesses
11 are from the Program Suppliers?

12 MR. OLANIRAN: Yes, Your Honor.

13 JUDGE BARNETT: Mr. Steckel? Dr.
14 Steckel?

15 MR. OLANIRAN: Dr. Steckel. Program
16 Suppliers call Dr. Joel Steckel.

17 JUDGE BARNETT: It is not an easy
18 place to get, or an easy place to be for that
19 matter.

20 THE WITNESS: But it is nice and snug
21 I can see.

22 JUDGE BARNETT: Will you please raise
23 your right hand.

24 Whereupon--

25 JOEL H. STECKEL,

**Before the
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Washington, D.C.**

In re

**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

NO. 14-CRB-0010-CD (2010-13)

Written Direct Testimony of

ALLAN SINGER

December 22, 2016

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I. QUALIFICATIONS

1. I have over twenty years of experience in the cable television industry as an executive involved with both the acquisition and the licensing of television programming. My job responsibilities during that period required that I be familiar with the fair market value of the different types of television programming distributed over cable systems.

2. In 1996, after practicing law for ten years, I joined the programming department at the then-largest cable system operator, Tele-Communications, Inc. ("TCI"). I was responsible for negotiating the rights to distribute programming content over TCI and its affiliated cable television systems serving more than 16 million subscribers throughout the United States. This included analyzing, and determining the amounts TCI would be willing to pay for, several general entertainment networks, sports services, premium services, movie services, pay-per view events (sports, music, and movies), broadcast and local television stations, and religious and shopping programming.

3. In 1999 TCI was acquired by AT&T Corp. and rebranded as AT&T Broadband. I was promoted to SVP, Programming at AT&T Broadband and became the department head. After Comcast acquired AT&T Broadband, in 2003 I was named SVP, Programming Investments for Comcast. I assisted in the management of Comcast's various programming networks (*e.g.*, E!, Golf Channel, OLN/VS, style, Comcast SportsNet Philadelphia); increasing the distribution and profitability of those assets; developing, launching and achieving distribution for new cable networks (*e.g.*, G4, TV1, and Sprout); and acquiring the rights for and development of new regional sports networks (CSN Chicago, CSN Bay Area, CSN Mid-Atlantic, SNY). I also evaluated the acquisition of various cable networks. My responsibilities included determining the market value of these businesses as reflected in the highest per

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subscriber/per month (“PSPM”) license fee cable systems and other multichannel video programming distributors (“MVPDs”) would pay for them.

4. In 2005, I became SVP, Sports Business Development for Comcast. I participated in the transition of Outdoor Life Network from a sportsman/outdoors channel to a national sports service; acquired the national television and new media rights for the then OLN/VS network from the National Hockey League; developed additional regional sports services; and negotiated for the rights to exhibit telecasts of National Football League games under a then-new, proposed Thursday night package.

5. In 2007, I was appointed SVP, Content Acquisition at Comcast. I resumed my prior role in the valuation and acquisition of content for the then-largest MVPD, including negotiations with various program networks for carriage on Comcast cable systems serving more than 20 million subscribers around the country. I also was involved in acquiring the rights to exhibit video content “online” and the rights to exhibit video on a “non-linear” basis (video on-demand or “VOD” and “download to go” rights).

6. In 2009, I became EVP, Distribution and Strategy, for the Oprah Winfrey Network (“OWN”), a joint venture between Discovery Communications, Inc. and Oprah Winfrey. Our business plan for OWN was to take Discovery Health Channel, which was at the time widely distributed for free, and rebrand the service as OWN. I developed the distribution strategy which transitioned all of the 80 million subscribers from the free Discovery Health Channel to a license fee based service in OWN. As such, it was critical to determine the most accurate yet highest PSPM license fee that MVPDs would pay for OWN.

7. In 2011, I moved to Charter Communications as SVP, Programming, where I again became head of an MVPD’s programming department and assumed the same program

acquisition and licensing responsibilities described above. In addition, I was responsible for evaluating the impact from technology changes in the distribution of content on content valuations. I reported to Charter's CEO and was part of the senior team that rebuilt Charter into the most profitable cable company in the country. During my tenure, Charter operated over 100 "Form 3" cable systems. I left Charter shortly after its merger with Time Warner Cable in May 2016.

8. My full resume is attached as Appendix A.

II. INTRODUCTION AND SUMMARY

9. I understand that the purpose of this proceeding is to allocate among different categories of program owners the royalties that cable systems paid to carry various out-of-market (distant) broadcast television signals during the years 2010-13 pursuant to the Section 111 statutory license. At the request of the Joint Sports Claimants ("JSC"), I have reviewed the report entitled *Cable Operator Valuation of Distant Signal Non-Network Programming: 2010-2013* prepared by Bortz Media & Sports Group, Inc. (the "Bortz Report"). The Bortz Report reflects the results of cable executive surveys which show how cable operators would have allocated their distant signal programming budgets among these program categories.

10. I believe that the 2010-13 survey results set forth in the Bortz Report accurately reflect the average relative values that cable system operators ("CSOs") ascribed to the different types of non-network programming on distant signals they carried during the years 2010 through 2013. These results are consistent with my experience as a cable programming executive; my familiarity with the marketplace during the time period in question; and my discussions with local programming decision-makers during the same time period. In particular, I agree with the conclusion that the sports programming on distant signals (including the superstation WGN) was

the most valuable programming on those signals – and that cable operators would have paid roughly one-third of their distant signal non-network programming budgets for that sports programming.

11. I also have reviewed the testimony that various cable executives provided in prior cable royalty distribution proceedings concerning earlier Bortz surveys and the valuation of programming on distant signals. As discussed below, I believe the points made in that testimony have equal applicability to the period 2010-13. However, changes in the marketplace have underscored the relative importance of the non-network sports programming on distant signals including WGN.

III. FACTORS CONSIDERED BY CABLE SYSTEMS IN MAKING PROGRAM CARRIAGE DECISIONS

12. There are several factors that affect a CSO's decision on whether to carry, and how much to pay for, particular types of programming. These factors are: (i) customer acquisition and retention, (ii) managing increasing programming expense, and (iii) bandwidth constraints.¹ The importance of these factors has evolved over time.²

13. The ability of particular programming to support customer acquisition and retention is a crucial factor in carriage decisions because subscriber fees comprise the vast majority of the revenue CSOs derive from their video service offerings. With the maturation of the multichannel video subscription industry by 2010, customer retention had become a more important factor than acquisition. It is easier to keep an existing customer than to tap into the

¹ Bandwidth is a cable operator's shelf space and will always have to be managed. However, due to technological and infrastructure improvements, by 2010-13, bandwidth was less of a concern in programming decisions than it had been in earlier years.

² An additional factor is the CSO's ability to offset programming expense through the sale of advertising. Cable networks typically provide distributors two to three minutes of advertising time per hour, which the distributor may use to advertise its own products and services, or sell to a third party to partially offset the costs of carrying the network. That factor is inapplicable here as CSOs may not insert advertising into distant signals.

small, stubborn universe of non-multichannel customers or to acquire a competitor's customer. It is difficult to find new programming that is truly a significant differentiator. MVPDs generally carry the same programming and seek to maintain access to that programming so as not to risk losing customers because of the absence of "must have" programming. In addition, much of the programming on unique, "independent" cable networks is undifferentiated, syndicated programming available on many platforms, that may be viewed at the customer's schedule off a variety of distribution platforms including outside of a subscription with an MVPD.

14. Thus, from 2010 through today a CSO is generally more concerned about retention of current customers, and values programming accordingly, *i.e.*, absent this programming the company may lose a subscriber to a competitor. A critical factor in determining whether to carry or continue to carry a programming service is the existence of unique, differentiated content.

15. When considering the carriage of a distant signal, the presence of live team sports programming is primarily what differentiates the signal. Each game is a unique, real-time event. Live team sports are popular with a passionate segment of good customers, the very type of customers the CSO is trying to retain. Customers who are fans of professional or college sports expect that these games will be available as part of the subscription, multichannel programming experience they are purchasing. A CSO risks losing customers to competitors if it does not carry services that are exhibiting live sports content, a risk that is not generally present with other non-network programming. Sports programming is the most expensive programming on a cable system precisely because in many instances without it a CSO will lose customers.

16. Another important factor is that, rather than being widely available on other outlets or through new distribution offerings, the distribution of live sports event programming is

generally limited. This limited availability increases the incentive to carry, and hence the value of, distant signals with sports programming.

17. In contrast, over time general entertainment programming has become more and more homogeneous, undifferentiated and accessible to viewing whenever and wherever one wants it and on an abundance of platforms. In (and after) 2010-13, syndicated television series from a distant signal were available on a first-run basis from the original exhibition source, while syndicated library product was generally available on many varied platforms, including for purchase or rental. Syndicated “library” movies are the same. Even when a category of content may be unique, very little of such programming is sufficiently “must have” such that its absence would cause a CSO concern that its absence, and its availability from a competitor, would cause the CSO to lose a customer to that competitor.

18. During 2010-13, by far the most widely retransmitted distant signal was the superstation WGN. Charter, where I served as SVP of Programming beginning in 2011, operated numerous cable systems that carried WGN as a distant signal. WGN was a long-standing and integral part of the channel lineup as it developed in the 1980s. WGN was the long-time home of the Chicago Cubs, an iconic American sports team with a national following. It also carried the telecasts of Major League Baseball games involving the Chicago White Sox and the National Basketball Association games involving the Chicago Bulls. During my tenure at Charter, I viewed the sports programming on WGN as the principal reason to carry it as a distant signal. Customers expected to have access to the sports on WGN. In contrast, the

syndicated reruns and movies on WGN, which were fungible with similar content on other channels and cable networks, had less value.³

19. Managing programming expense also is a crucial consideration for any CSO. Much of these costs can be explained by the critical necessity to carry sports services so as not to lose subscribers, and the high cost associated with sports programming relative to other types of programming.

20. In light of these concerns, the decision of whether to carry an independent programming service, and particularly distant broadcast signals, was therefore driven by whether or not the cost of the programming was justified by the risk that absent this signal the company may lose customers to a competitor.

21. Given this test, the local programming decision to maintain the expense and copyright fee associated with carriage of a distant signal was primarily driven by sports programming. It justified the continued expense to the CSO's increasing programming budget because it was crucial to retaining cable subscribers.⁴ From my experience, and given what was occurring in the industry at that time, sports programming was the primary justification for maintaining the expense.

IV. BORTZ REPORT RESULTS

22. The Bortz Report found that CSOs would have allocated their expenditures on categories of distant signal programming as set forth below.

³ While it did not impact the amount of the royalty paid by a CSO to carry WGN, as noted in the Bortz Report, some of the programming on the WGN superstation feed is not compensable in these proceedings because it was not carried simultaneously on the local WGN Chicago broadcast station. This was the case with the vast majority of the syndicated programming, movies, and devotional programming on WGN. In contrast, all of the live team sport events on WGN were carried simultaneously on both the local and superstation feeds.

⁴ As stated in note 2 above, CSOs may not insert advertising into distant signals, and so there was not even a nominal cost offset from cable spot advertising revenue.

Table I-1.
Distant Signal Programming Valuation Studies, 2010-13

	2010	2011	2012	2013	2010-13 Average
Live professional and college team sports	40.9%	36.4%	37.9%	37.7%	38.2%
News and public affairs programs	18.7%	18.3%	22.8%	22.7%	20.6%
Movies	15.9%	18.6%	15.3%	15.5%	16.3%
Syndicated shows, series and specials	16.0%	17.4%	13.5%	11.8%	14.7%
PBS and all other programming on non-commercial signals	4.4%	4.7%	5.1%	6.2%	5.1%
Devotional and religious programming	4.0%	4.5%	4.8%	5.0%	4.6%
All programming on Canadian signals	<u>0.1%</u>	<u>0.2%</u>	<u>0.6%</u>	<u>1.2%</u>	<u>0.5%</u>
Total*	100.0%	100.0%	100.0%	100.0%	100.0%

*Columns may not add to total due to rounding.

Source: Bortz Report, Table I-1.

23. These results are consistent with my experience and represent a reasonable estimate of how CSOs, on average, would have allocated their royalty payments for distant signal non-network programming among the respective categories of such programming.

24. The CSO responses to the Bortz Report reflect the greater relative value of sports programming to CSO decision makers. In 2010-13, the live professional and college sports programming on distant signals was the “must have” programming on those signals. Sports is consistent “tune-in”, destination programming – its story is most compelling while it is occurring live. Because it is differentiated, unique and exclusive, it presents a substantial risk of subscriber loss if not carried. Thus, sports correctly receives the largest percentage of a distant signal allocation for the royalty payments. In contrast, during this period, syndicated non-network programming became more widely available over various platforms, including outside an MVPD subscription, and the necessity for its exhibition on a specific network was less compelling and necessary.

25. The Bortz Report results indicate that Sports has a high value per each hour carried or viewed: respondents allocated approximately 40% of their budgets to programming that makes up a much smaller percentage of the total hours of programming carried and viewed

on distant signals. That result is not surprising and is consistent with my knowledge and background in the industry. Based on my experience, including purchasing national and regional sports rights, live professional and college team sports programming is – and was in 2010-13 – significantly the most expensive programming a broadcaster or cable network acquires. Programmers pay these ever-increasing amounts for sports rights only because they are able to monetize the rights fees through carriage agreements with MVPDs. Indeed, the power and value of sports content to MVPDs are further demonstrated in the marketplace by the fact that the only new cable networks since the prior proceeding and during this time period able to launch to widespread, expanded basic-type distribution at significant license fees on all MVPDs were sports services; specifically, the NFL Network, Big 10 Network and SEC Channel.

26. The fact that CSOs place a high relative value on sport programming also is reflected in the market price paid through arms-length negotiations with sports networks by MVPDs as compared to general entertainment and other genres of cable networks. On a PSPM basis, the most expensive services for any MVPD are ESPN, ESPN2 and regional sports networks. These services are approximately 4 to 5 times more expensive than the next most expensive non-sports services, and 10 times more expensive than some of the most popular, name brand, general entertainment services. By far the most expensive cable network that is primarily a general entertainment service is TNT, and that is because it exhibits NBA and NCAA Men's basketball games. TNT is roughly 3 times more expensive to MVPDs each month than other popular, brand name, general entertainment networks. Thus, when CSOs negotiate in the marketplace for the carriage of cable networks on their systems they consistently, invariably pay significantly more for sports services than any other genre.

27. In short, my experience with marketplace transactions is consistent with and confirms the high relative value of Sports found in the Bortz Report.

V. PRIOR CABLE EXECUTIVE TESTIMONY

28. I have reviewed the testimony submitted in prior proceedings by the following industry executives: (1) Judith Allen, former SVP of Video at MediaOne, then the third largest multisystem operator (“MSO”) (JSC Ex. No. 1); (2) Michael Egan, former Director of Programming at Cablevision Industries, a multistate MSO (JSC Ex. No. 9); (3) Jerry Maglio, former SVP of Marketing and Programming at United Artists Cable, then one of the largest MSOs (JSC Ex. No. 10); (4) Judith Meyka, former SVP Programming at Adelphia Communications, the fifth largest MSO (JSC Ex. No. 11); (5) James Mooney, former President and CEO of the National Cable Television Association (“NCTA”), the cable industry’s principal trade association (JSC Ex. No. 12); (6) Trygve Myhren, former head of the cable television subsidiary of Time Inc. (later Time Warner Cable) (JSC Ex. No. 13); (7) June Travis, former Executive Vice President and Chief Operating Officer of the NCTA (JSC Ex. No. 17); (8) Roger L. Werner, then President and CEO Prime Sports Ventures, Inc., which operated multiple regional sports networks, and former CEO of ESPN (JSC Ex. No. 19); and (9) Robert J. Wussler, the former CEO of the nation’s then largest superstation, WTBS from Atlanta (JSC Ex. No. 20).


29. Although the MVPD industry has evolved significantly over time, the central points made in the testimony of these cable industry executives about the value of sports programming, both generally and in the context of distant signals, remain true today. I agree that:

- CSOs seek unique programming to attract and retain subscribers. (Wussler, pp. 2-3; Myhren, p. 6; Allen, p. 5; Meyka, p. 4.)

- Sports programming is particularly valuable to CSOs because it is unique, live and non-fungible and has passionate fans. (Werner, p. 3; Wussler, pp. 2-3; Maglio, p. 9; Myhren, p. 4; Mooney, p. 11; Allen, p. 5; Travis, p. 3; Egan, p. 4; Meyka, p. 9)
- Sports programming is a key driver for distant signal carriage because the programming often cannot be had anywhere else. (Myhren, pp. 4-5; Mooney, p. 10; Travis, p. 3; Meyka, p. 11.)
- Sports are the primary reason for CSOs to carry WGN (and other superstations). (Wussler, p. 4 (regarding WTBS); Maglio, p. 8 (discussing WGN, WTBS and WWOR); Mooney, p. 10 (regarding WTBS); Allen, p. 5 (WGN); Egan, pp. 5-6 (WGN); Meyka, p. 10 (WGN).)
- Cable subscribers are unlikely to complain about the loss of movie or rerun syndicated programming on distant signals because there are other sources for that programming. (Maglio, p. 10; Myhren, p. 4-5; Travis, p. 4; Egan, p. 3.)
- Viewing is not an accurate measure of a cable network/distant signal's value to a CSO. (Werner, pp. 3-4; Wussler, p. 3; Myhren, p. 6.)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 19, 2016.


Allan Singer

APPENDIX A

ALLAN SINGER

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Denver, CO 80209

(215) 375-4416
allansinger@comcast.net

PROFESSIONAL EXPERIENCE

CHARTER COMMUNICATIONS, INC.

Senior Vice President, Programming
March 2011 to September 2016

As Senior Vice President, Programming, at Charter Communications I headed the company's programming department and reported to Charter's CEO. I was responsible for managing all aspects of Charter's acquisition of video content; including negotiating carriage agreements with large media companies and independent networks, evaluating carriage of cable channels, acquiring video on demand and library offerings from various content companies, developing the budget and long-range plan for the company's largest expense, examining business models for new packages and different distribution modalities, and in managing the department. I was also involved in the various M&A activities in which the company was involved during this time period, and was part of the senior management team that transformed Charter into an extremely successful company.

OPRAH WINFREY NETWORK, LLC

Executive Vice President, Distribution and Strategy
November 2009 to March 2011

At the Oprah Winfrey Network (OWN), I lead the transition from Discovery Health to OWN, was involved in the strategy surrounding OWN's launch and supervised US distribution, digital distribution and overseas distribution agreements. I created OWN's license fee structure and worked closely with OWN's Board to implement our distribution strategy, prepared affiliate marketing materials, presented the Network to distributors and negotiated all agreements. I was responsible for the most successful new network launch in the last fifteen years, increasing distribution and establishing a healthy affiliate revenue stream.

COMCAST

Senior Vice President, Content Acquisition
June 2007 to October 2009

As Senior Vice President, Content Acquisition, at Comcast I was responsible for acquiring network distribution rights with content providers on behalf of the largest multichannel distributor. My responsibilities included negotiating content agreements with media companies for distribution of their

Public Version

cable networks, VOD and broadband content and other new media initiatives. I was also involved in examining and effectuating programming strategies for Comcast.

Senior Vice President, Business Development, Sports
June 2006 – June 2007

In this position, I was responsible for securing sports rights across various distribution and technology platforms, with particular emphasis on acquiring these rights for Comcast's regional and national sports networks. I also helped develop Comcast's regional and national sports strategy. I was the lead negotiator in the acquisition of National Hockey League rights for the exhibition of games on linear

television, streaming, VOD and broadband rights for Comcast and VS, and was on the Comcast team that negotiated with the NFL.

Senior Vice President, Programming Investments
March 2003 – June 2006

Comcast's former programming investments department was responsible for managing and expanding Comcast's network portfolio. Our department evaluated numerous acquisition opportunities of media companies, networks and strategic rights acquisitions. It acquired TechTV and combined it with our G4 Network, growing that network from 17 to 52 million subscribers. We developed and launched TV One and PBS Kids Sprout. I was also responsible for the supervision of the various Comcast networks' affiliate sales and marketing departments, and entered into affiliation agreements on their behalf with various cable and DBS providers. I also led the rights negotiations that resulted in the creation of Comcast SportsNet Chicago, obtained the rights to Sacramento Kings' games resulting in the development of Comcast SportsNet West and negotiated the rights and affiliation agreements that created SportsNet New York.

AT&T BROADBAND, LLC (formerly Tele-Communications, Inc.)

Senior Vice President, Programming
President, Satellite Services, Inc., 2001 - 2003
1996 - 2003 (SVP, 2001 - 2003, Vice President 1997 - 2001, Director 1996)

As Senior Vice President of Programming at AT&T Broadband and President of Satellite Services, Inc., its content acquisition subsidiary, I lead rights acquisition negotiations with content providers for the nation's then largest cable television company. In this capacity, my department completed programming agreements with a variety of media companies for the distribution of cable and broadcast networks, movie studios and pay-per-view events and sports content. I negotiated complicated rights transactions, drafted and reviewed sophisticated contracts, evaluated equity positions, developed and initiated long-term strategy goals and analyzed the financial ramifications of long-term programming obligations. I also worked with the company's marketing department to assist in cooperative promotional relationships with other media companies and facilitated the implementation of programming decisions by our local business operations.

Public Version

WHITE AND STEELE, P.C.

Partner 1994 - 1996

Associate 1987 - 1993

I was a partner with White and Steele, at the time the twelfth largest law firm in the Rocky Mountain region. At White and Steele, I tried cases in district courts throughout Colorado where I primarily defended professional negligence cases for attorneys, accountants and health care providers. I briefed and argued cases before the Colorado Supreme Court and other appellate courts, and assisted licensed professionals in matters before their disciplinary boards and regulatory agencies.

FIERST AND CHRISTOPHER, P.C.

1986 - 1987

HOLMES AND STARR, P.C.

1985 - 1986

General associate attorney duties at these firms.

CHIEF JUDGE DAVID ENOCH, COLORADO COURT OF APPEALS

Judicial Clerk 1984 - 1985

EDUCATION

JURIS DOCTOR, UNIVERSITY OF COLORADO, Boulder, Colorado 1984

BACHELOR OF ARTS, DICKINSON COLLEGE, Carlisle, Pennsylvania 1981

-Magna Cum Laude

-Phi Beta Kappa

-Varsity letterman in lacrosse in each of my three years at Dickinson

-Attended Hatfield College, Durham University, England, junior year

BOARD MEMBERSHIPS and ORGANIZATIONS

-Board Member, iN Demand, 2001 - 2002

-University of Colorado School of Law Dean's Advisory Committee, 2014-2106

-Board Member, Make A Wish of SE Pennsylvania 2006 to 2009

-Board Member, Colorado Special Olympics of Colorado 2000 - 2003

-Board of Directors, Forest Hills Metropolitan District, 1994 - 1996

-Colorado Bar Association Ethics Committee, 1990 - 1993

ACTIVITIES

I enjoy tennis, skiing, guitar, reading and spending time with my two sons.

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

DISTRIBUTION OF CABLE
ROYALTY FUNDS

)
)
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) NO. 14-CRB-0010-CD (2010-13)
)
)

Written Rebuttal Testimony of

ALLAN SINGER

September 15, 2017

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I. QUALIFICATIONS

1. I have over twenty years of experience as an executive involved with both the acquisition and licensing of television programming to and by cable system operators (“CSOs”) and other multichannel video programming distributors (“MVPDs”). I served as a programming executive at Tele-Communications, Inc. (“TCI”) and its successor ATT Broadband (1996-2003), Comcast (2003-09) and, most recently, Charter Communications (2011-16) where I was the head of the programming department. During my tenure, Charter operated over 100 “Form 3” cable systems and became the most profitable CSO in the country. My responsibilities at Charter and the other CSOs included the negotiation (and overseeing the negotiation) of licensing and carriage agreements with several basic and premium cable networks, broadcast television stations and regional sports networks (“RSNs”); in the process, I evaluated a wide range of sports and other programming on behalf of MVPDs and in licensing such content for cable and regional sports networks. I also served as EVP, Distribution and Strategy, for the Oprah Winfrey Network (2009-11), a cable network reaching over 80 million subscribers; and I have represented several cable networks and RSNs in the negotiation of carriage agreements with MVPDs.

2. A more detailed description of my qualifications is set forth in Appendix A to my December 22, 2016 written direct testimony on behalf of the Joint Sports Claimants (“JSC”) in this proceeding.

II. INTRODUCTION AND SUMMARY

3. In my written direct testimony, I discussed the factors that affect a CSO’s decision whether to carry, and how much to pay for, particular types of programming. I also discussed why CSOs placed a very high value on the live professional and college team sports programming on distant signals during the years 2010-13, as reflected in the cable operator

surveys conducted by Bortz Media & Sports Group, Inc. (“Bortz”).¹ In addition, I explained how testimony offered by other cable executives concerning program valuation in prior cable royalty distribution proceedings had applicability in this proceeding as well.

4. At the request of JSC, I have now reviewed the written direct testimony presented on behalf of the Program Suppliers by Sue Ann R. Hamilton, Howard Horowitz, John Mansell, Jan Pasquale and Professor Joel Steckel. I do not believe that anything in the testimony of these witnesses provides a proper basis for departing from the results of the 2010-13 Bortz surveys to determine the relative value of the different types of distant signal programming that CSOs carried during the years 2010-13; nor does that testimony undermine the fact that the MLB and NBA programming on WGNA, the most widely carried distant signal during that period, was the principal driver of that carriage.

III. PROGRAM SUPPLIERS’ WRITTEN DIRECT TESTIMONY

A. Sue Ann R. Hamilton

5. Ms. Hamilton — who left Charter in 2007 — suggests that cable systems carried WGN America (“WGNA”) because they were “required” to do so as part of a “bundle” of Tribune Media stations.² During the 2010-13 period at issue in this proceeding, Charter systems that carried WGNA did so because of the value it provided, not because of any “bundling” or other leverage from Tribune. Indeed, during this period, an annual average of approximately 86 Charter Form 3 systems made the decision to carry WGNA on a distant basis each year, and on average approximately 69 of those systems did not carry any other Tribune station in addition to WGNA. At same time, approximately 11 Charter Form 3 systems carried Tribune-owned

¹ See Bortz, “Cable Operator Valuation of Distant Signal Non-Network Programming: 2010–13” (“Bortz Report”) (Dec. 22, 2016).

² Written Direct Testimony of Sue Ann R. Hamilton, at 7 (“Hamilton Testimony”) (Dec. 22, 2016).

stations on a local basis, but did not carry WGNA. These carriage patterns are not consistent with Ms. Hamilton's claim that Tribune required cable systems during 2010–13 to carry WGNA as part of a bundle deal for other Tribune Media stations. The data also demonstrate that individual Charter systems determined whether carriage of WGNA made economic sense for each such system.

6. While there was a “legacy” of carrying WGNA on many systems, the mere fact of legacy carriage would not result in a Charter system continuing to carry a signal, as Ms. Hamilton suggests.³ Programming costs were growing by 8-12% annually with the largest driver of those increases being sports programming. In light of this cost pressure, every programming expense was scrutinized closely, including the costs of carrying distant signals — notwithstanding that, as Ms. Hamilton notes, distant signal costs were a “small fraction” of Charter's overall programming budget.⁴ During the 2010–13 period, the decision whether to carry WGNA, and other distant signals, on a particular system remained at a local or regional leadership level, subject to review at the corporate level (which was one of my responsibilities).

7. I considered WGNA as justifying its cost on its own merits, primarily due to the MLB and NBA programming available on WGNA. In evaluating the desirability of carrying a particular distant broadcast signal or cable network, I (and other programming professionals) focus not on its total “24/7” content provided, but rather on the signature programming or other differentiating content that it offers. In the case of WGNA, the key programming that justified its continued carriage on Charter systems during 2010–13 was the live MLB and NBA sports telecasts. In my judgment the undifferentiated syndicated shows, movies, devotional programming and infomercials on WGNA would not have justified a field leader's decision to

³ See Hamilton Testimony at 6.

⁴ *Id.* at 8.

retain WGNA as a distant signal. Indeed, far from adding value, content such as infomercials detracted from the value of the WGNA signal; although it was not possible under the laws governing the carriage of distant signals, it would have been preferable to omit that content from the WGNA signal. By contrast, due to the compulsory license, the MLB and NBA live-game telecasts on WGNA were in fact cheaper to obtain than most telecasts of live team sports programming available in the unregulated marketplace, and that alone justified the continued carriage of WGNA.

8. This focus on key programming — most often live professional and college team sports — was not unique to WGNA. For example, in determining the value of carrying an RSN, the key focus is on telecasts of live team events, specifically the JSC professional sports leagues (MLB, NBA, NFL, and NHL), college football and men's college basketball. The other “shoulder” programming and lesser sporting events carried by an RSN made little to no difference to the value of the RSN to Charter (and other MVPDs). This is reflected in the fact that MVPD carriage agreements with RSNs typically delineate the network's value based on the carriage of those JSC telecasts. In contrast, carriage agreements for other types of networks typically provide for only general content descriptions (e.g., a “24-hour news service” or a “general entertainment network primarily focused on health and wellness”) and content prohibitions (e.g., no adult programming, no infomercials), and do not require the continued carriage of specified programming. The contractual requirements regarding continued carriage of JSC telecasts reflect the high value (and cost) of this must-have live sports programming (as well as the recognition that this JSC programming has uniquely recognizable value).

9. Ms. Hamilton (and other Program Suppliers witnesses) suggest that the relative value of each type of programming on distant signals is better reflected in its relative share of

viewing among cable subscribers rather than its share in the Bortz survey of CSOs. But that is wrong. In particular, live professional and college team sports programming typically commands a much higher price than its Nielsen ratings would suggest when licensed to cable networks; and cable networks and RSNs with JSC programming command higher license fees than their Nielsen ratings would suggest. On the other hand, other programming with significant Nielsen ratings frequently receive relatively low license fees from MVPDs. This is particularly true of cable networks whose programming is comprised mostly of undifferentiated movies and syndicated shows from prior seasons, as such programming may be found on many channels, watched on-demand or is frequently available on online services. In contrast, live team sports programming commands premium prices because it is unique, differentiated programming involving live events with passionate fans. Nielsen ratings have even less significance to determining value where, as is the case with distant signals, CSOs may not insert advertising and derive advertising revenues related to viewership.

10. For all types of cable networks, MVPDs typically pay license fees on a per subscriber/per month basis, regardless of whether that subscriber actually views the programming on the network. During 2010-13 sports networks such as ESPN and RSNs received the highest license fees by multiples over the fees paid for even the highest rated general entertainment networks, whose programming is primarily original series, syndicated prior seasons and movies. Further, the general entertainment cable network with the highest license fees in 2010-13, TNT, was not the most highly rated general entertainment network, but did carry JSC sports. Despite healthy ratings, many cable networks carrying primarily movies and/or syndicated series garnered license fees that were significantly less than what sports networks commanded.

11. Ms. Hamilton (and other Program Suppliers witnesses) also are incorrect to suggest that the definition of the Sports category used in the Bortz survey – live professional and college team sports – would be confusing to MVPD executives because it is inconsistent with the general cable industry classification of program genres.⁵ To the contrary, industry professionals routinely consider that segment of programming to be a distinct (and uniquely valuable) category. For example, as discussed above, MVPD licensing agreements with RSNs typically carve out live professional and college team games into a separate category from all of the other content on the RSN — in a manner recognizing that it is those games (not the other content on the RSN) that drives the network’s value to MVPDs. In short, thinking of live professional and college team sports as a special and distinct subset of programming is a familiar concept to MVPD executives.

12. The Bortz definition is clear to industry professionals — it is expressly limited to “team” sports, and only includes “professional” or “college” sports. Programming professionals understand that auto racing, golf, tennis, running, swimming and the like are not “team” sports, and that the Olympics are not professional or college sports. Additionally, the more prominent “other” sports events — such as major golf and tennis tournaments and the Olympics — were typically carried on Big 3 *network* broadcasts (or specialty cable networks such as the Tennis Channel and Golf Channel) that are not compensable in these proceedings.⁶

13. Moreover, the sporting events that impart significant value to a distant signal from the perspective of an MVPD are live professional and college team sports. The presence or absence of other, more minor sporting events was not material to my evaluation of whether it

⁵ See Hamilton Testimony at 10–12.

⁶ The Bortz surveys expressly reminded respondents to “exclude from consideration any national network programming from ABC, CBS and NBC.” Bortz Report at 16, 17.

made sense for a Charter system to carry a particular distant signal. For example, WGNA carried a single horse race per year, the “*Arlington Million*,” in 2011-13.⁷ I do not recall whether I was aware of that fact at the time, but the presence or absence of that horse race would have had no impact on my assessment of WGNA’s value proposition to Charter. Likewise, from my perspective as programming professional, whether a distant signal carried events such as “ninja” and “warrior” races, cycling, running, swimming, wrestling, figure skating and the “other sports” identified by Ms. Hamilton⁸ was not a material consideration in determining whether to carry that signal.

B. Howard Horowitz

14. I understand that other JSC witnesses will address the methodology of Mr. Horowitz’s cable operator surveys more comprehensively.⁹ From my perspective as a cable programming executive, the addition of an “Other Sports” category to the Horowitz surveys did not make sense for the reasons discussed above; non-network “Other Sports” had no meaningful presence in the distant signal marketplace during the years 2010-13. While I did not consider “Other Sports” to be a material consideration for any distant signal, it is particularly surprising that Mr. Horowitz included an “Other Sports” category in his questionnaires for CSO respondents (nearly one-half of his respondents) that carried WGNA as their only commercial distant signal. For all practical purposes, there were no “Other Sports” on WGNA.

15. The 2011-13 Horowitz surveys list the “*Arlington Million*” as an “example” of “Other Sports” on WGNA.¹⁰ However, as noted above, that single horserace was the only

⁷ Written Rebuttal Testimony of James M. Trautman at 17 (“Trautman Rebuttal Testimony”) (Sept. 15, 2017).

⁸ Hamilton Testimony at 11.

⁹ See Corrected Written Direct Testimony of Howard Horowitz (“Horowitz Testimony”) (April 25, 2017).

¹⁰ Trautman Rebuttal Testimony at 20.

“Other Sports” on WGNA during each of the years 2011-13, and the presence or absence of that single horserace was immaterial to the value of WGNA as a distant signal.

16. For the year 2010, the Horowitz survey lists *WWE Superstars* as an example of “Other Sports” on WGNA. My understanding is that there were only two compensable hours of “*WWE Superstars*” on WGNA in all of 2010.¹¹ *WWE Superstars* was a pre-taped, staged entertainment program; as a programming professional, I do not consider it (and similar “pro wrestling” shows) to be sports programming at all. In my opinion as a cable programming professional, those two episodes of *WWE Superstars* did not contribute any material value to WGNA in 2010.

17. The Horowitz surveys instructed respondents, “Please do not assign any value to programs that are substituted for WGN's blacked out programming.”¹² This instruction apparently was intended to address the fact that programming shown on WGNA is compensable in these proceedings only if it was carried simultaneously on the local WGN Chicago signal. However, from a CSO's perspective, the percentage of WGNA programming that was compensable to copyright owners had no bearing on the amount of statutory royalties the CSO had to pay in order to carry WGNA. Therefore, I — and another programming executives — had no reason to know or seek to determine which local WGN programming was and was not “blacked out” on WGNA, and this instruction was meaningless as best.

C. John Mansell

18. The data in Mr. Mansell's testimony provide further confirmation that live team sports programming was very valuable to MVPDs in 2010-13. While focusing on the growth of additional outlets for sports programming such as RSNs, the Mansell report overlooks two key

¹¹ Trautman Rebuttal Testimony at 21.

¹² Horowitz Testimony at 36.

points. First, that growth was driven by (and reflects) the high value of telecasts of live professional and college team sports. Live team sports telecasts likewise had a high value when carried on distant signals. Second, despite growth of RSNs, the amount of live team sports on distant signals remained stable in 2010-13 as compared with 2004-05. Indeed, data on the compensable minutes of distant signal programming, weighted by the number of subscribers to which it was retransmitted, indicates that if anything live team sports comprised a somewhat greater share of the compensable distant signal marketplace in 2010-13 than in 2004-05.¹³ Further, the amount of live team sports carriage on the most widely carried distant signal, WGNA, remained consistent from 2004-05 to 2010-13, even as the amount of compensable Program Suppliers content on WGNA decreased over that period.¹⁴ Therefore, none of the changes discussed by Mr. Mansell would warrant any decrease the relative share of the Sports category from its 2004-05 shares.

19. Moreover, broader changes in the media environment, which Mr. Mansell ignores, actually increased the relative value of live team sports versus other types of programming on distant signals. By 2010, the relative value of syndicated programming and movies on distant signals had been driven down by the proliferation of other sources for such programming. These include not only incremental, new cable networks and time shifted platforms such as on-demand, but also increasingly successful platforms such as Netflix, which made the undifferentiated, widely accessible movie and syndicated series programming exhibited on distant broadcast signals even less necessary and thus less valuable.

20. In contrast, sports are unique as they represent the only programming (besides breaking news events) that is resistant to time-shifted viewing. We watch sports to see what

¹³ Written Rebuttal Testimony of Mark Israel, Ph.D., at pp. 17-18 and Table 4 (Sept. 15, 2017).

¹⁴ Bortz Report at 27–29; Bortz Media compilation of JSC telecasts on WGNA.

happens at the moment it occurs, as the events unfold on the field of play. With the passion consumers feel for sports teams, there is immediacy that necessitates the ability to witness sports as they happen, a requirement that a game will be available for viewing at the moment it is being played. As a result, live sports programming has been relatively immune to the impacts of the evolving media environment — and thus has increased in relative value — in the years since 2005.

D. Jan Pasquale

21. Mr. Pasquale, who previously worked at HBO, states that HBO found Nielsen ratings data to be useful and that he “would expect CSOs to find Nielsen ratings similarly valuable in deciding what broadcast stations to retransmit.”¹⁵ As discussed above, Nielsen ratings do not correspond with the amounts that CSOs pay for programming, particularly JSC programming on distant signals. Rather, the critical considerations in determining whether to carry or continue to carry a distant signal were the existence of unique, differentiated content and “must have” programming such as live team sports.

22. Moreover, even in the very different context of premium networks such as HBO, in my experience Nielsen ratings were a non-factor in those premium networks’ carriage negotiations with MVPDs. I personally negotiated renewals with HBO at TCI, Comcast, and Charter, and I do not recall Nielsen data ever being part of a sales presentation or discussion with HBO. If the HBO sales team did discuss the service’s popularity, it was in the context of survey evidence demonstrating certain program’s popularity and loyal followings (e.g., *Girls*’ popularity with women aged 18–54) or that including HBO in bundled packages was an expectation of an MVPDs’ customers.

¹⁵ See Written Direct Testimony of Jan Pasquale, at 4 (Dec. 22, 2017).

E. Professor Joel Steckel

23. Professor Steckel opines that the Bortz survey required respondents to undertake an “unfamiliar” task because they were asked to value categories of programming, rather than valuing entire signals or networks.¹⁶ It is true that CSOs generally acquire the rights to carry an entire signal or cable network. However, evaluating what to pay for a signal or network necessarily requires consideration of the value of the various types of programming on it (and in particular the signature programming). Additionally, different networks feature different types of programming (CNN features news, ESPN and RSNs feature sports, TBN features devotional programming, etc.), and CSOs need to be familiar with and consider the relative value and costs of these different types of cable networks, which turns on their underlying programming content. Thus, contrary to Professor Steckel’s speculation, the task posed by the Bortz survey was not an unfamiliar one, but rather involved factors that are familiar to programming executives.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2017.



Allan Singer

¹⁶ See Written Direct Testimony of Joel Steckel, Ph.D., at 23–24 (Dec. 22, 2017).

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IN THE MATTER OF:)

) Docket No.

DETERMINATION OF CABLE) 14-CRB-0010-CD

ROYALTY FUNDS) (2010-2013)

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4 IN THE MATTER OF:)

5) Docket No.

6 DETERMINATION OF CABLE) 14-CRB-0010-CD

7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

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19 9:03 a.m.

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23 Reported by: Karen Brynteson, RMR, CRR, FAPR

24

25

1 roundtable discussion, we certainly would pursue it.

2 So that's all I have to say on that.

3 And I believe, Mr. Garrett, you are -- we
4 have a witness on your list today.

5 MR. GARRETT: Yes, Your Honor.

6 Mr. Singer.

7 JUDGE BARNETT: It's an obstacle
8 course there. Please be careful.

9 THE WITNESS: Okay.

10 Whereupon--

11 ALLAN SINGER,
12 having been first duly sworn, was examined and
13 testified as follows:

14 JUDGE BARNETT: Please be seated.

15 THE WITNESS: Thank you.

16 MR. CANTOR: Good morning, Your
17 Honors. Dan Cantor of Arnold & Porter for the
18 JSC.

19 DIRECT EXAMINATION

20 BY MR. CANTOR:

21 Q. Good morning, Mr. Singer.

22 A. Good morning, Mr. Cantor.

23 Q. Would you please introduce yourself
24 for the Court.

25 A. I am Allan Singer.

1 Q. Would you give us an overview of your
2 professional background.

3 A. Yes. For the last 20 years -- for
4 over 20 years, I've been a programming
5 executive in the cable television industry,
6 during which my job has been evaluation of
7 programming content, both in the acquisition of
8 programming content for cable companies and
9 television networks and also in the licensing
10 of programming from networks to cable companies
11 and other distributors.

12 Q. What was your most recent job in the
13 cable industry?

14 A. From 2011 until a little over a year
15 ago, I was senior vice president of programming
16 at Charter. At Charter, I was the head of
17 programming, the head of the programming
18 department.

19 And my job was the evaluation of --
20 the evaluation, valuation of programming and
21 subsequent negotiation and acquisition of such
22 programming for Charter's cable systems.
23 During that time, part of my responsibility
24 would have been overseeing decisions made
25 relating to distant broadcast signals.

1 Q. Where did you work prior to Charter?

2 A. From 2009 through 2011, until 2011, I
3 worked at the Oprah Winfrey Network. My job at
4 Oprah -- I was the executive vice president of
5 distribution and strategy. And my job at Oprah
6 was the exact opposite of what it was at
7 Charter. I was selling Oprah's content for her
8 new network to the distributors, to the cable
9 companies, Verizon and AT&T, and to DISH and
10 Direct, the two DBS providers.

11 Q. And let's just go a step further back
12 in time. Where did you work prior to the Oprah
13 network?

14 A. Prior to the Oprah Network, I was at
15 Comcast in several programming positions. I
16 started in about 2002, 2003, again on the
17 network side of the -- of what the -- the
18 networks that Comcast owned. I was senior vice
19 president of programming investments. I
20 managed the Comcast programming networks at
21 that time, E!, Style, G4, also negotiated,
22 again, as I did at Oprah, against the large
23 distributors if we had a renewal. So if E! had
24 a renewal with DirecTV, I would negotiate that.
25 I'd work on the rate card, which I also had

1 done at Oprah.

2 And -- and I did business development.

3 I helped develop a bunch of networks at
4 Comcast, TV1, G4, Sprout, and I also did some
5 business planning and acquired rights, the more
6 expensive rights for the networks. I would
7 assist in that and building a business plan
8 around that.

9 Over time, that segued to acquiring
10 more and more sports rights. And I became
11 senior vice president of sports business
12 development at Comcast, and I was essentially
13 just acquiring sports rights at the time,
14 developing a bunch of regional sports networks
15 for Comcast in Chicago, the Bay Area, with the
16 New York Mets, Sports Net New York. I worked
17 on some of the rights agreements here in
18 Mid-Atlantic, and I -- I acquired National
19 Hockey League rights for what was the Outdoor
20 Life Network and what we transitioned to a
21 national sports network that we called Versus.

22 I ended up my tenure at Comcast going
23 back to the cable company and doing the job
24 that I had prior to that, negotiating against
25 the networks. I was SVP of content

1 acquisition, I think it was called.

2 Q. And, finally, let's just take one more
3 step back in your employment history. Prior to
4 Comcast, would you tell us about your work in
5 the cable field?

6 A. Yeah, briefly I started in 1996 at
7 Telecommunications, Inc., TCI, which was at the
8 time what Comcast is today, the very largest
9 cable company. I worked my way up to SVP of
10 programming and headed up the department. The
11 company by then had been bought by AT&T, so I
12 was the head of programming at the largest
13 cable company when Comcast bought that company.

14 Q. And in these various positions in the
15 cable industry, did you have an opportunity to
16 evaluate and value different types of
17 programming?

18 A. My job throughout my -- throughout my
19 career has been the valuation of television
20 programming, ascribing a price to it, trying to
21 obtain the highest rate that I thought the
22 Oprah Winfrey Network could get while
23 maintaining carriage, justifying to financial
24 departments at large companies the acquisition
25 of expensive programming and how we'd make a

1 business plan around it.

2 MR. CANTOR: Your Honors, the JSC
3 offer Mr. Singer as an expert in the valuation
4 of television programming in the cable
5 industry.

6 JUDGE BARNETT: Hearing no objection,
7 Mr. Singer is so qualified.

8 MR. CANTOR: Thank you.

9 BY MR. CANTOR:

10 Q. Mr. Singer, have you been retained as
11 an expert in this proceeding by the JSC?

12 A. Yes, I have.

13 Q. Would you please tell us about your
14 assignment.

15 A. I was asked to provide advice to the
16 JSC concerning the factors that a programming
17 executive at a cable system would use in
18 valuating programming and specifically how
19 those factors would interrelate with cable
20 companies trying to manage increasing
21 programming expense, and, finally, whether
22 those factors -- how those factors -- whether
23 they were consistent or not with the Bortz
24 survey's findings relating to distant broadcast
25 signals.

1 Q. You should have in front of you a
2 binder that has Exhibit 1008 and 1009 in it.
3 If we start with Exhibit 1008, would you please
4 tell us what that is?

5 A. This is my written direct testimony in
6 this matter.

7 Q. And would you please tell us what
8 Exhibit 1009 is?

9 A. It's my written rebuttal testimony in
10 this matter.

11 Q. And did you prepare both Exhibit 1008
12 and 1009?

13 A. Yes, sir.

14 Q. Do you declare that Exhibit 1008 is
15 true and correct and of your personal
16 knowledge?

17 A. Yes.

18 Q. And, likewise, with regard to
19 Exhibit 1009, do you declare that Exhibit 1009
20 is true and correct and of your personal
21 knowledge?

22 A. Yes.

23 Q. Thank you.

24 Let's talk about, if you would --
25 provide for us some background regarding the

1 factors that a cable operator in the period
2 2010 to 2013 would have considered in
3 determining what programming to carry and how
4 much to pay for it.

5 A. Well, it's a little rudimentary, but
6 the cable television video business is about
7 having people pay you money for subscription
8 television for a panoply of cable television
9 networks that are paid networks, unlike
10 over-the-air broadcast networks.

11 So the two major factors historically
12 have been is this programming such that it will
13 help me acquire customers or retain customers?
14 By 2010, cable television's video product was a
15 mature industry in around 30, 35 years in its
16 present format, depending on when you want to
17 tether that.

18 And as such, acquisition was becoming
19 less and less important at least for the cable
20 company, which was the original incumbent
21 provider of video. And several reasons for
22 that. The cable companies and the satellite
23 companies that we were directly competing with
24 provided 99 percent of the same video content,
25 so it wasn't that distinguishable unless you

1 took something off that the other side had that
2 your customers needed.

3 So it was hard to sell -- as a cable
4 company, it was hard to get acquisition by
5 saying you had a different video product.
6 Secondly, for all the companies, there was a
7 hard-core segment of customers that just don't
8 want to pay for television. And it's a hard
9 nut to crack. So it's easier to keep a
10 customer that you have than to go get a new
11 one.

12 So although acquisition remained
13 important, if you looked at what cable
14 companies were doing at this time, it would be
15 to sell the video product in a bundle with
16 high-speed data and with phone, which the
17 satellite companies didn't have. The video
18 product was basically indistinguishable if you
19 didn't drop something that they had that
20 customers wanted. So retention became the real
21 key. Is this the type of programming that I
22 need to launch because I'm not going to have
23 customers, I'll lose customers? Or is it the
24 type of programming that, if I don't keep on, I
25 have the risk of losing customers?

1 You also have to remember at this time
2 around 2010, 2011, the marketplace was judging
3 cable companies by how many subscribers, video
4 subscribers, it was losing. Being the
5 incumbent, with the phone companies having
6 moved into the business and satellite having a
7 very aggressive product, how many customers did
8 you lose?

9 So losing customers could equate to
10 losing market -- the market value of the
11 company and your stock price. Healthy
12 companies like Comcast at this time were losing
13 about 1,000, 2,000 customers a quarter.
14 Unhealthy companies were losing quite a bit
15 more a quarter, video customers. And it was
16 impacting their stock price.

17 For all those reasons, retention ends
18 up being the critical factor in evaluate -- a
19 very critical factor in evaluating television
20 programming at this time.

21 Q. Did management of costs play a role in
22 your considerations?

23 A. The management of costs also became an
24 overlying primary concern at this time. For
25 the video business, all the distributors,

1 80 percent of your expense is the programming,
2 is what you're paying the networks. At the
3 same time, programming costs were escalating by
4 about 8 to 10 percent, primarily driven by
5 sports costs escalation.

6 So that's not very tenable,
7 particularly when customers are understandably
8 complaining about their annual rate increases
9 to try to cover those costs, which it just
10 couldn't. So managing -- managing programming
11 expense, while you're trying to determine
12 whether or not content justifies continued
13 carriage or launching because you'd lose a
14 customer become interrelated.

15 JUDGE STRICKLER: Excuse me. Good
16 morning, Mr. Singer. Co.

17 THE WITNESS: Sure.

18 JUDGE STRICKLER: How are you?

19 THE WITNESS: Hi.

20 JUDGE STRICKLER: You said cost
21 increases were going up 8 to 10 percent. Was
22 that annually?

23 THE WITNESS: On an annual basis, I
24 apologize. Yes.

25 JUDGE STRICKLER: From very roughly

1 2010 to 2013?

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: And you said it was
4 particularly in the sports area, I think you
5 said?

6 THE WITNESS: Particularly in sports
7 areas. Sports costs constituted 40
8 some percent of cable companies' expense.
9 Sports costs were going up 5 to 7 and a
10 half percent on an annual basis for the large
11 sports networks and for the regional sports
12 networks. Regional sports networks average
13 rate increases were about 7 percent.

14 When you come out of contract with a
15 sports network, you would frequently have huge
16 escalators. We'd call it a step-off. So if I
17 was paying \$4 for a regional sports network,
18 when I came out of contract for it, they'd want
19 \$4.60. If I was paying \$3 for product and they
20 -- and they created a new network, like Sports
21 Net New York, the new network would cost \$3 on
22 its own, something -- roughly.

23 JUDGE STRICKLER: Maybe I didn't
24 appreciate the time frame, but you said cost
25 increases were about 8 to 10 percent, and then

1 you said particularly sports, and then you said
2 5 to 7 and a half percent. That struck me as
3 lower than the 8 to 10 percent. I suspect I'm
4 missing something in there.

5 THE WITNESS: You are because we're
6 also having these step-offs during this time
7 period where new networks are being created or
8 sports networks are -- excuse me, sports
9 networks are migrating. So you'd have the Mets
10 network. The Mets network starts. Mets
11 network had been part of Cablevision's FOX
12 Sports New York.

13 So FOX Sports New York's prices are
14 escalating by 7 percent a year, but then you
15 have another \$2 tied up to that when SNY
16 launches in New York. And that was going on at
17 this period of time.

18 You had a panoply of national rights
19 that were transferring to new networks. You
20 had a panoply of regional rights that were also
21 transferring to new networks which had this
22 huge step-off effect.

23 JUDGE STRICKLER: I see.

24 THE WITNESS: Same thing going on with
25 broadcast television at the time too. So when

1 a broadcaster came out of contract, if you had
2 been paying the broadcaster 30 cents, three
3 years later you might be paying them a dollar.

4 So on top of the 5 to 7 percent sports
5 increases, you were having these increases
6 popping on and on a fairly consistent, periodic
7 basis.

8 JUDGE STRICKLER: And you referred to
9 it as sports in your testimony, and then your
10 example was in professional team sports.

11 THE WITNESS: Yes.

12 JUDGE STRICKLER: Were these expenses
13 going up at this level for all sports or are
14 you focusing just on team sports, which, as you
15 may know, refers to --

16 THE WITNESS: Right.

17 JUDGE STRICKLER: -- the Sports
18 Claimants category here?

19 THE WITNESS: In my testimony, I -- I
20 would be using the term "team sports" in my
21 testimony today. When I think of sports costs,
22 when a cable decisionmaker thinks of sports,
23 they're thinking of the four major sports
24 leagues and they're thinking of the NCAA major
25 sports. The other sports don't have a separate

1 allocated price generally in the industry and
2 don't have these same type of escalators.

3 JUDGE STRICKLER: Thank you.

4 THE WITNESS: Thank you.

5 JUDGE BARNETT: Mr. Singer, I believe
6 you prefaced this discussion by saying -- by
7 setting us in the time frame of 2010.

8 THE WITNESS: Yes, ma'am.

9 JUDGE BARNETT: And I know our concern
10 here is 2010 to 2013.

11 THE WITNESS: Right.

12 JUDGE BARNETT: Are you about to tell
13 us what happened after 2010?

14 THE WITNESS: Thank you very much. I
15 apologize for not being clear.

16 I was saying that at 2010, this is
17 what things look like. This was continuing
18 over time. For instance, I think in 2013 at
19 Charter, we got our year-over-year cost
20 increase down to 5 percent, but the next year
21 they were jumping up above 10 percent when pure
22 companies like Comcast and DirecTV were
23 announcing 10 percent increases. The two
24 largest companies.

25 So we were able to manage it for this

1 one time period by doing some extraordinary
2 and, frankly, crazy things with programming,
3 but the next year it just went -- it went right
4 back up. So what I was describing was
5 happening through this whole period of time
6 and, frankly, is escalating beyond '13, '14,
7 and '15.

8 This is going on today. And it's --
9 and there's other issues today too.

10 JUDGE BARNETT: Certainly. I'm sure
11 your attorney will get into that, but --

12 THE WITNESS: Yes, ma'am.

13 JUDGE BARNETT: -- I just wanted to
14 make sure that you were talking about the time
15 frame that is at issue in this hearing.

16 THE WITNESS: Yes. I was setting the
17 stage for 2010, but that -- my description is
18 what's going on during this time period,
19 including these types of annual increases.

20 JUDGE STRICKLER: And when you say you
21 were able to keep costs down by doing some
22 extraordinary and crazy things, it's hard to
23 leave that hanging out there in the programming
24 context of this proceeding.

25 (Laughter.)

1 JUDGE STRICKLER: What extraordinary
2 and crazy things were you doing?

3 THE WITNESS: Well, I'm obviously not
4 a very well-prepared witness. But what we did
5 was we threatened to take things off, to take
6 some channels off.

7 There were costs -- Charter had
8 costs -- it had come out of bankruptcy and it
9 had costs that, from my experience at Comcast
10 and in the industry, looked high, and we
11 basically said we're just going to drop it if
12 -- we'll risk losing customers if we have to;
13 we'll just drop it.

14 We had a major, major premium service
15 that was out of contract, and we said -- that
16 we had a flat rate for. We paid them X, tens
17 of millions a year on an annual basis. We said
18 we'll pay you half, or we just don't offer it
19 to customers anymore. That was crazy because
20 some percent of our customers were receiving
21 that premium service as part of a bundle, and
22 we would have had to figure out a way to --
23 figure out something else to give the customers
24 for value.

25 JUDGE STRICKLER: So a commercial game

1 of chicken?

2 THE WITNESS: Yes, it was. It's --
3 with the programming expenses going up like
4 this, it was some hard -- there's hard
5 negotiations with many of the people here,
6 including the Joint Sports Claimants. So, yes.

7 Hard negotiations, I'd call it, as
8 opposed to chicken. I think some of the things
9 we felt we really had to do.

10 JUDGE STRICKLER: Thank you.

11 THE WITNESS: Yes, sir.

12 BY MR. CANTOR:

13 Q. Mr. Singer, you've been talking about
14 the goal of customer retention and also the
15 balance of cost control. Given these two
16 factors, were there particular characteristics
17 that you were looking for during this time
18 period in programming?

19 A. Right. Well, when we're trying to
20 make these hard decisions in the one year we
21 did what I said was crazy things, we're looking
22 at content and we're seeing whether it's --
23 whether it has certain categorization --
24 whatever the word is. Is it differentiated?
25 Does it have some type of signature

1 programming? Is there something unique about
2 it?

3 It's differentiated versus other
4 programming within that genre even. Are
5 customers passionate about it? Is it something
6 that people really feel that they need to have?
7 And that's not just broad passion. That can be
8 niche passion. You know, we're going to lose
9 some customers if we don't have this type of
10 passionate product.

11 And, lastly, is it the type of
12 product, the availability of which is somewhat
13 limited, particularly is it limited just to
14 this network? You can only get Game of Thrones
15 on HBO, for instance. That would be a good
16 example. As opposed to just content that's
17 available or a program that's available on a
18 wide variety of networks or platforms, because
19 we have streaming services available at this
20 time that are outside of our subscription
21 television window.

22 Q. Would you please give us an example of
23 the type of differentiated limited programming
24 that you're talking about?

25 A. Well, sports checks every one of the

1 boxes if you think about it. It's distinct.
2 Each sport is distinct. Each league is
3 distinct. There's signature programming, major
4 event program that you must-have, like The
5 Final Four in basketball. There's -- the
6 event, the athletes themselves, some teams are
7 signature. The Cubs are a signature, iconic
8 team. The athletes themselves, LeBron James,
9 Tom Brady. I could have said Kurt Cousins, but
10 not any longer. You know, they're -- they, in
11 and of themselves, are brands. There's nothing
12 that a broad segment of customers consistently
13 are as passionate about as sports teams. Their
14 their college football team, their alums, their
15 local hockey, their local basketball team, a
16 baseball team they grew up with. I don't
17 really need to waste time talking about the
18 passionate nature of sports fans.

19 And, lastly, sports is -- has very
20 limited availability. The exhibition is
21 generally just on one channel. It's not on
22 several channels, so it's not like a rerun that
23 might be on two or three cable networks and a
24 broadcaster. It's only generally on one
25 channel, the channel somewhat associated with

1 the product. And related to the limited -- the
2 limited availability is it's live. It's the
3 last live programming that we have.

4 When I started, when I started in '96,
5 '97, tune-in program was really important. The
6 Sopranos were coming on Sunday, the initial
7 exhibition, at 8:00 o'clock. That's when you
8 watched. Even though HBO had Plexus and you
9 could watch it later, tune-in was critical.

10 When I would go to E!, they'd have a
11 big grease board with every network and what
12 was programming and counter-programming. That
13 doesn't exist any more.

14 In limited circumstances, you do want
15 to be there when the season finale or the
16 season premier is on or a series finale, but
17 generally the last of the tune-in programming
18 with some exceptions is sports. It doesn't
19 lend itself to latter exhibition. Even if you
20 do DVR it, you're not watching it unless you're
21 keeping it for the archive or you played in the
22 game. You don't know what's going to happen.
23 It's true reality programming. At the start of
24 the game, you don't know who is going to win.
25 You don't know who is going to be a hero or who

1 is going to be a loser.

2 So not only is it -- does it have
3 limited availability on one channel generally,
4 almost exclusively, but it also has this live
5 component that doesn't lend itself to latter
6 exhibition of recording or on-demand.

7 Q. Are there other examples -- are there
8 examples other than sports of this type of
9 signature differentiated programming that
10 you're talking about?

11 A. Sure there are. On a one-off basis,
12 news can be that way. News, obviously, is
13 live. It's timely. Although we have a lot of
14 different news channels, people prefer to get
15 their news from MSNBC or a Fox News, depending
16 on the points of view, and are loyal to certain
17 ones of these channels or CNN.

18 If there's an event of national import
19 or tragedy like last week, people turn to news
20 in that same way and are passionate, it's
21 important. I mentioned series finales. Hit
22 series absolutely can be that way. A hit
23 series can drive a network, can drive my
24 decision to carry not just the network but two
25 or three other networks associated with it.

1 And hit series ties in to the other
2 things that I've talked about too. Is it
3 available on another platform? So ratings can
4 be an indication that something is popular and
5 passionate, but that's not necessarily the end
6 of the story.

7 A show like Mad Men had passionate,
8 passionate viewers, but it never got a superior
9 Nielsen rating. At the same time, I had to
10 carry AMC because my customers expected and
11 wanted to have Mad Men. And I had to carry the
12 three other networks that those guys owned
13 because I wanted to carry Mad Men.

14 Regionality can also be important.
15 For instance, farming communities, you had --
16 at this period in time, you had to have the
17 Weather Channel. Weather wasn't as widely
18 distributed on devices as it is today. So a
19 farming community, you'd want something like
20 the Weather Channel. So regionality can impact
21 certain types of programming as well.

22 Q. How about syndicated reruns or old
23 movies? Do those have the signature or
24 differentiated qualities that you're talking
25 about?

1 A. It doesn't meet the standards that I
2 just walked through. It -- syndicated
3 programming and movie reruns have an absolute
4 place in our universe, and they get a
5 consistent Nielsen rating.

6 When we had Outdoor Life Network, they
7 would put on a movie that would have some
8 outlying tie to the outdoors, simply because
9 they'd get a consistent point 3 rating, which
10 for that network was really, really high and
11 would help them make their advertising
12 requirements for the month.

13 Nielsen ratings are really important
14 because the cable television industry has two
15 revenue streams, the network side. It has what
16 the distributors like me would pay, and it has
17 advertising that they would make.

18 For a general entertainment network,
19 advertising comprises two-thirds of the revenue
20 that the general entertainment network would
21 receive.

22 What I was paying was only one-third.
23 And Nielsen ratings are obviously the benchmark
24 by which advertising -- the advertising
25 community and networks look at programming. So

1 although that programming may get a Nielsen
2 rating, that's important for advertising.

3 It's undifferentiated. It's not
4 signature programming. If it's a hit show, if
5 it's a hit show that has been on broadcast for
6 years like How I Met Your Mother, it's a latter
7 exhibition.

8 And although they might -- TBS might
9 show three or four of those a night and get a
10 consistent rating at that point at night, I am
11 not going to lose customers because shows like
12 that are going to be available on other
13 networks, either cable networks, frequently
14 they're still available on broadcast, they're
15 available on-demand, they're susceptible to
16 DVRs, so they have wide availability over many,
17 many platforms besides this particular channel
18 and, frankly, outside of the subscription
19 television industry.

20 So it has a lot less value. It has
21 value in that it gets a consistent rating and
22 provides revenue to the networks, and I'm happy
23 that it's on because it depressurizes my hard
24 conversations with these networks. I want them
25 to make money off of advertising, but when I'm

1 making a determination do I need to continue to
2 carry this network or not, it -- it won't
3 impact me that this rerun or these older movies
4 aren't on if I decide to take a network off.

5 Q. So let's talk about Charter's carriage
6 of distant signals for a little bit. During
7 the period 2010 to 2013, did Charter carry
8 WGNA?

9 A. Yes, it did.

10 Q. Why did Charter carry WGNA?

11 A. WGNA had 109 to 120 some games of the
12 Chicago Cubs, the Chicago White Sox, and the
13 Chicago Bulls. WGNA had been on cable systems
14 for the longest of times, had been launched
15 with certain cable systems when they wanted a
16 super-station and wanted a large panoply of
17 sports, when ESPN still had tractor pulls and
18 there wasn't the panoply of national sports
19 services, and it continued to be on because of
20 those sports.

21 You had a huge, huge number of games
22 for a pretty reasonable dollar value. The
23 expense was not that high. And of those games,
24 at least for Charter, we had certain systems
25 that were outside of the Chicago DMA, like in

1 Wisconsin, that might have been the Brewers, in
2 the MLB territory for the Brewers, which is --
3 are not big fans of the Cubs, but we had so
4 many transplanted people from Chicago, it was
5 like a regional sports network in certain ones
6 of our markets.

7 Iowa was another company that I worked
8 at, it was in the Cardinals' MLB territory, but
9 it was Cubs country. The Iowa Cubs were there,
10 and even though I was spending a lot of money
11 for Fox Sports Net Midwest and the Cards, I had
12 to have the Cubs on.

13 So it has a regionality focus. Also
14 it's a national team, it's an iconic national
15 team. And it's a lot of tonnage. If the Bulls
16 become good again and are like the Warriors and
17 you have all those Bulls games on, that has
18 real value. You can't parse out I only want
19 the Cubs and I don't want the Bulls anymore.
20 It all comes together. But it's a good value
21 proposition.

22 And, lastly, my two primary video
23 competitors, cable's two primary video
24 competitors, DirecTV and DISH, have had it on
25 for a long time. If I don't have it, it

1 appears that I am no longer competing with them
2 in sports. I've lost a huge tonnage of games.
3 I can lose that Cubs fan that's in L.A. or
4 Maryland. But also it just has a perception
5 that we don't have sports quality. And, again,
6 I could lose customers.

7 JUDGE STRICKLER: Excuse me,
8 Mr. Singer. Can I call your attention, please,
9 to paragraph 19 of your written direct
10 testimony. I think that's Exhibit 1008, if you
11 have it in front of you.

12 THE WITNESS: Sure.

13 JUDGE STRICKLER: Tell me when you're
14 there, sir.

15 THE WITNESS: Sir, is it 19?

16 JUDGE STRICKLER: Paragraph 19 --

17 THE WITNESS: Oh, excuse me.

18 JUDGE STRICKLER: -- page 7.

19 THE WITNESS: I was looking --

20 JUDGE STRICKLER: Maybe I misspoke.

21 THE WITNESS: No, you didn't.

22 JUDGE STRICKLER: Oh, yes, I can.

23 THE WITNESS: Page 7, I got it. I'm
24 here. Yes, sir.

25 JUDGE STRICKLER: Okay. So it says,

1 "Managing programming expense also is a crucial
2 consideration for any CSO. Much of these costs
3 be can be explained by the critical necessity
4 to carry sports services so as not to lose
5 subscribers, and the high cost associated with
6 sports programming relative to other types of
7 programming."

8 THE WITNESS: Yes.

9 JUDGE STRICKLER: That's the end of
10 the paragraph. You're referring there, of
11 course, not to the retransmission of distant
12 stations but the general acquisition -- cost of
13 acquisition of sports otherwise?

14 THE WITNESS: Yes, sir.

15 JUDGE STRICKLER: Because sports is
16 critical in that regard, does that mean that in
17 your negotiations with the NCAA or the NHL or
18 the NBA, or what have you, that they are able
19 to squeeze out a lot of the value for
20 themselves knowing it's so important to the
21 cable company that it reduces the profitability
22 of those -- of those systems in terms of
23 subscribership revenue because they know you
24 have to have them, so they -- they sort of are
25 sitting in the -- to use a baseball expression,

1 the catbird seat?

2 THE WITNESS: That's absolutely true,
3 and it's -- the exercise here, as I understand
4 it, is we're trying to step outside of the
5 copyright royalty and find what the marketplace
6 would bear. What evidence is there in the
7 marketplace for valuation of the various
8 programmers on distant signals?

9 JUDGE STRICKLER: Right.

10 THE WITNESS: If you do that, we have
11 two places where we're going to show that,
12 which Mr. Cantor and I will probably talk
13 about.

14 We have what you just described, which
15 is what's happening to the distributor that
16 they are able to drive that, and not just drive
17 that, but when the NCAA does their deal with
18 Turner, who bought those rights, and Turner
19 comes to me, they're not just getting top
20 dollar for TNT and TBS. I'm carrying TruTV and
21 TCM and all these other things within the
22 bundle of Turner's services because I have to
23 have the NCAA and I have to have the NBA, so
24 I'm paying more for TNT than any other general
25 entertainment programmer.

1 The second marketplace is what happens
2 to Turner when they talk to the NCAA and they
3 drive a billion dollar fee for three weeks of
4 programming, three weeks of prime-time
5 programming. And they're driving fees that are
6 absolutely extraordinary, given what Turner is
7 paying for fine programming, including some of
8 the programming here, syndicated programming.

9 JUDGE STRICKLER: Well, that leads me
10 to my question based on paragraph 19. If these
11 sports networks or whoever their distributors
12 are who you negotiate with, the sports leagues,
13 I should say, and whoever the distributors are,
14 are able to take for themselves so much of the
15 value, what -- aren't you more concerned with
16 the net value that's left over after they drive
17 their hard bargains and doesn't that make
18 sports -- given that fact, does that make
19 sports otherwise less valuable than other types
20 of programming because while the other
21 programming might not be as critical to
22 subscriber retention, you're giving away all
23 the value -- so much of the value of subscriber
24 retention to Turner, to the NCAA, and to the
25 four major leagues?

1 THE WITNESS: One could say that --
2 not during this time period, not during this
3 time period at all, were anyone answering your
4 question in the affirmative that, yeah, it's
5 just too expensive, I'd rather lose customers
6 than pay money and reduce my margins further.
7 No one was answering that question in the
8 affirmative.

9 There is some one-offs going on right
10 now, in the last year or so, where people for
11 the first time -- where large distributors are
12 likely not to carry regional sports networks
13 for that very reason. It went beyond a price
14 point where let's see if we lose customers
15 before we sign up for it again.

16 But at this period of time, this is
17 must-have programming. Cable companies --
18 we're trying to fix the cable company at
19 Charter, who made it the most profitable
20 company in revenue. Over this time period, we
21 couldn't risk losing a sports customer.
22 They're some of our best customers, some of our
23 most passionate customers. It still has huge
24 intrinsic value.

25 And, sir, although today people -- I

1 think distributors are saying enough is enough,
2 Fox just doubled down and bought -- paid more
3 for declining ratings of eight NFL games
4 because they're breaking off part of their
5 company and they still believe in the playbook,
6 buy sports and we'll drive it through
7 distributors.

8 So I think -- I can answer your
9 question more in the affirmative today that
10 people are starting to take a breath and saying
11 do I really need to carry this one sports team
12 for more than I was paying for everything else?
13 At this period of time, it was not happening,
14 it was just -- it was such -- it was just
15 something I had to have that I was just paying
16 an ungodly amount of money for.

17 JUDGE STRICKLER: And the difference
18 -- help me out here. The difference between
19 2010 and 2013, that period, versus today is
20 that the -- the price that's being demanded by
21 the distributors of the -- of the sports
22 programming has risen?

23 THE WITNESS: No. It's just going on
24 the -- to answer the Judge's first question,
25 it's just going on the same scale.

1 JUDGE STRICKLER: So it has increased
2 but it hasn't -- second derivative, it hasn't
3 increased --

4 THE WITNESS: Exactly. Right, but --

5 JUDGE STRICKLER: -- at an increasing
6 rate?

7 THE WITNESS: But just think, I mean,
8 we're doing this (indicating) on 80 percent of
9 the expense, so, yes, so it has gone to a point
10 that you just take your breath and say: Let's
11 not launch this right now at the start of the
12 baseball season and let's see if we lose
13 customers. And if we're losing customers, we
14 will go back and maybe we'll launch this new
15 baseball network. That's very, very recent.
16 Regional baseball network.

17 JUDGE STRICKLER: Thank you.

18 BY MR. CANTOR:

19 Q. Mr. --

20 A. Mr. Cantor, I'm sorry.

21 Q. No problem. Please answer the Judges'
22 questions.

23 A. Okay.

24 JUDGE BARNETT: Or not. At your
25 peril.

1 (Laughter.)

2 THE WITNESS: Okay. I'll do what I
3 can.

4 BY MR. CANTOR:

5 Q. So you were just talking about some
6 more recent phenomena in the valuation of
7 sports and the importance. Does the carriage
8 of team sports remain an important factor even
9 today in the cable industry, notwithstanding
10 some of the cost pressures you were just
11 talking about?

12 A. It does. I know when I left, we
13 hadn't -- we hadn't dived into the deep end of
14 the pool really that we didn't think we had to
15 carry sports. And we actually thought -- we
16 were thinking and considering, you know,
17 expanding our interest in the regional sports
18 network business.

19 So it's not clear. The judge makes a
20 good point, but I don't think it was really
21 applicable at this point in time. And I don't
22 know if -- I think people are still going to be
23 addicted to sports. It's just too powerful,
24 even given the cost.

25 Q. So we were talking about WGNA, and you

1 were talking about the value you attached to
2 the team sports programming on WGNA during the
3 period 2010 to 2013.

4 How did you view the general
5 entertainment sitcom and movie programming that
6 was on WGNA during this period?

7 A. As someone that has been on the
8 network side, I viewed it as important for WGNA
9 and I didn't have a complaint about it, but it
10 wasn't why we had it on. For instance, I think
11 in 2011, WGNA syndicated 30 Rock, which was a
12 great show. It was on NBC broadcast. It was
13 still extremely popular. It wasn't really on a
14 downward slide. And I think that was one of
15 the premier syndicated reruns that WGNA had on.

16 Well, 30 Rock at the time is still on
17 NBC. It's susceptible to being DVR'd, is being
18 DVR'd. And when they bought 30 Rock, Comedy
19 Central syndicated the same package. So when I
20 say that something -- how accessible is it on
21 other networks, the fact that you can watch 30
22 Rock on broadcast television on NBC, the
23 original exhibition, on WGNA, and on Comedy
24 Central and they licensed it, they syndicated
25 it widespread to local broadcast. So it's also

1 all over local broadcast.

2 So -- so at this period of time like
3 one of the really good reruns that they had on
4 WGNA is available on NBC, local broadcasts,
5 which are outside the subscription universe,
6 you can watch them for free, and it's available
7 on another cable network, Comedy Central. It's
8 a good show.

9 They put it on because it got, I'm
10 sure, a decent rating and helped them with
11 their advertising. And that's good. But it's
12 not a reason for me to continue to carry it
13 such as I don't want to lose the Cubs fan in
14 Florida.

15 JUDGE STRICKLER: Mr. Singer, the
16 testimony you just gave reminded me of
17 something else you said before about Turner and
18 negotiations. I don't know which cable company
19 you were with at the time.

20 THE WITNESS: Yes.

21 JUDGE STRICKLER: With Turner, and you
22 said: Well, we want the sports that Turner
23 offers. But then when we get into negotiations
24 there's a whole bundle, we have to pay for it.
25 I think that was the phrase you used, that we

1 have to pay for it.

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: So we had to take
4 TCM, Turner Classic Movies, and TNT and
5 whatever else is in the Turner group of
6 stations.

7 THE WITNESS: Yes, sir.

8 JUDGE STRICKLER: When you decided
9 what to pay for the Turner collection of
10 stations, did you pay extra because they were
11 forcing you to take Turner Classic Movies --
12 let's just assume it was just Turner Classic
13 Movies and, I don't know, Atlanta Braves
14 baseball --

15 THE WITNESS: Right.

16 JUDGE STRICKLER: -- TBS, that's what
17 you were looking at. Did you pay more for
18 something even though you valued it at less
19 than what you were paying for it?

20 THE WITNESS: We paid more for TNT,
21 which is where the primary sports were, the --

22 JUDGE STRICKLER: Just so I
23 understand, when you say we paid more, what
24 does that mean, more than what?

25 THE WITNESS: If you look at TNT as

1 compared to USA Network, which doesn't have
2 team sports on it, TNT gets paid substantially
3 more.

4 JUDGE STRICKLER: And you're saying
5 that disparity is approximately measured by the
6 value of team sports?

7 THE WITNESS: Yes. Then we're paying
8 about 10 cents more for TBS than FX, a
9 comparable network. We're paying -- and, to
10 answer your question, finally, we are paying
11 for Cartoon Network, TCM, TruTV, which we might
12 not have carried.

13 So not only are we carrying them but
14 we are paying them a top license fee, the
15 incremental networks, so the ability for Turner
16 to buy sports not just helps the TNT rate but,
17 to get to your point, helps all the networks in
18 the manner it's sold.

19 JUDGE STRICKLER: Well, let's say the
20 Cartoon Network is part of Turner -- is that
21 what you're saying?

22 THE WITNESS: Yes, sir.

23 JUDGE STRICKLER: So let's say Cartoon
24 Network was worth nothing to you, you just
25 didn't think it was valuable, however you

1 measured value, subscribers or what have you.

2 THE WITNESS: Right.

3 JUDGE STRICKLER: But TBS with the
4 Braves, that was valuable. You understood you
5 were still paying -- that the amount of money
6 you were paying still was -- some of the extra
7 was attributable to the Cartoon Network, why
8 wouldn't you have assumed that was attributable
9 to Braves baseball and TBS if that was the
10 thing that had value? Why would you pay one
11 penny for something that had no value?

12 THE WITNESS: Cartoon Network had a
13 value.

14 JUDGE STRICKLER: Well, I'm doing it
15 by way of assumption.

16 THE WITNESS: TruTV had very little
17 value.

18 JUDGE STRICKLER: I remember Ren and
19 Stimpy. I mean, that's good stuff. I'm not --
20 it was all by way of hypothetical.

21 THE WITNESS: Yeah, I understand.
22 Well, actually, sir, you're thinking exactly
23 the way my CEO at the time thought about this.
24 We're just going to pay Turner -- we have to
25 pay Turner a boat load of money because we have

1 to carry NCAA, NBA, and some -- at this period
2 of time, some occasional MLB playoff games, and
3 we're going to pay them a pile of money, let's
4 negotiate really hard, try to pay as little --
5 do as good a deal financially as we can, do as
6 well as we can on where we need to carry things
7 and get as large a panoply of rights as we can.

8 But he would break it down to it's a
9 pile of money, but the pile of money was being
10 driven by sports.

11 JUDGE STRICKLER: Sure.

12 THE WITNESS: And that's why the pile
13 of money for them was bigger than if you had
14 taken Scripps Networks, which doesn't have
15 sports but has networks which are as high or
16 higher -- or more highly rated than some of the
17 Turner networks, and they're receiving 25 to
18 30 percent of what Turner is getting.

19 JUDGE STRICKLER: For accounting
20 purposes, did you have to allocate the amount
21 that you were paying to the different networks
22 or it was just one lump sum to Turner?

23 THE WITNESS: It was allocated for the
24 different networks based upon the 60 months of
25 the contract.

1 JUDGE STRICKLER: And am I correct in
2 understanding your testimony that, regardless
3 of how you allocated it or how Turner allocated
4 it, you understood economically you were paying
5 the money for the thing that you valued, which
6 was TBS and team or college sports?

7 THE WITNESS: Yes. And I still looked
8 at it as what am I paying for the individual
9 networks vis-à-vis comparable networks as part
10 of the negotiation process. I'm sort of joking
11 but sort of not joking that my CEO got to the
12 point where he looked at it as you originally
13 described it, it's a pile of money that's going
14 up because of sports, the must-have nature of
15 the sports programming. We can't drop it.

16 JUDGE STRICKLER: Thank you.

17 BY MR. CANTOR:

18 Q. And, Mr. Singer, we've been --

19 JUDGE BARNETT: I'm sorry.

20 MR. CANTOR: Please, Your Honor.

21 JUDGE BARNETT: This is a really
22 loaded question, but --

23 THE WITNESS: Okay.

24 JUDGE BARNETT: -- assume someone, a
25 surveyor called you and said: You're in charge

1 of programming for -- or program acquisition
2 for Charter --

3 THE WITNESS: Yes.

4 JUDGE BARNETT: -- and you know in
5 your head you've paid a pile of money for TNT.

6 THE WITNESS: Right.

7 JUDGE BARNETT: And that it's being
8 driven by sports, but you said also in your
9 mind you have assigned a value to those other
10 channels. So if they asked you how much you
11 paid to acquire sports, would you back off of
12 that pile to three-quarters of a pile or would
13 you just say we paid this pile for sports, and
14 that other stuff we didn't pay anything for it,
15 it just came along with the bundle?

16 THE WITNESS: Well, if I'm asked to
17 ascribe valuation, and let's say I was doing
18 the exercise for TNT, ascribing 40 percent of
19 the value, which I think is what Bortz ends up
20 doing, or 38 percent of the value makes sense
21 because there is value to the original
22 programming on TNT. There is value to the
23 other categories of programming on the Bortz
24 survey.

25 So I'm saying that if you look at

1 market -- at the marketplace, these two market
2 points, what distributors are paying and what
3 these big powerful media companies are paying,
4 there's really no comparison. And it doesn't
5 correlate to Nielsen. It doesn't correlate
6 really at all to Nielsen, but that doesn't mean
7 that other programming doesn't have significant
8 value.

9 Game of Thrones is as important as
10 sports. It meets all the criteria that I
11 walked through, that it's on one location and
12 it's distinct and a hit show, a hit show on its
13 initial exhibition broadcast, hits this
14 criteria, and gets great ratings, Nielsen
15 ratings. Nielsen ratings can correlate to this
16 type of popularity.

17 So I would be able to break it down
18 and I wouldn't say sports is 90 percent of WGNA
19 because it's not.

20 JUDGE BARNETT: Okay.

21 THE WITNESS: We do carry it for other
22 reasons.

23 JUDGE BARNETT: So you and presumably
24 -- and you believe your counterparts across the
25 industry can -- can make those fine

1 distinctions?

2 THE WITNESS: Yeah. Your Honor, I
3 don't see them as fine distinctions and I
4 understand I'll probably have some questions
5 about that in a few minutes, but those are
6 fairly simple terms. Devotional, Public
7 Television, broadcast, and the breakout between
8 syndicated movies and -- and syndicated
9 programming are really fairly common and pretty
10 easy to keep clear in one's mind, particularly
11 when you're thinking about the average distant
12 signal and why am I bringing that signal into
13 my market when the guy at corporate is all over
14 you to drop it if you can?

15 JUDGE BARNETT: Thank you.

16 JUDGE STRICKLER: Mr. Singer, you
17 mentioned before -- I apologize for jumping
18 around to different parts of your testimony,
19 but they come back episodically --

20 THE WITNESS: Yes.

21 JUDGE STRICKLER: And you said that
22 now, in the present time, cable companies are
23 now declining to pay what sports leagues or
24 distributors for sports leagues are demanding.
25 They're testing out to see whether or not,

1 they're going to find out, which goes to my
2 question, whether or not that causes a loss of
3 subscribers.

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: When did that
6 phenomenon exist where the cable companies
7 showed resistance of that nature to price
8 increases?

9 THE WITNESS: About -- about two years
10 ago, three years ago. Comcast, which I was not
11 at and I wasn't -- I don't have anything to do
12 with. Comcast has cable systems in the New
13 York DMA that are primarily in north Jersey.

14 And they did not renew Yes Network,
15 which is the Yankees network. And I think Yes
16 Network was off for a summer. It's also when
17 the Yankees were on the down, you know, they've
18 now -- popularity of teams does impact things.
19 The Yankees were on the down and -- and hadn't
20 been in the playoffs for a couple of years.
21 They got back -- they got back on. An
22 agreement was eventually reached, but for
23 baseball season, that was a big thing that
24 Comcast wasn't carrying Yes Network.

25 Time Warner Cable launched a Lakers

1 channel, so in the Los Angeles market, there
2 were two regional sports networks, Fox Sports
3 Net 1 and 2 that Fox owned. It had all six of
4 the pro teams, the two baseball teams, hockey
5 teams, and two basketball teams in that market.

6 And the general cost of Fox Sports 1
7 and 2 was about -- approaching \$7 for the two
8 networks. Time Warner Cable -- the Lakers, the
9 Lakers agreement with Fox was up, and Time
10 Warner Cable ended up spending huge amounts of
11 money for the Laker rights, started a Lakers
12 channel, that was the only thing that was on
13 it, and asked for \$4 for the Lakers channel,
14 when all six of the channels were getting about
15 \$7 to Fox, who were pretty aggressive
16 negotiators. And everyone signed up for it.
17 All the distributors signed up for it at \$4,
18 about \$4.

19 The next year, the Dodgers rights were
20 up, and Time Warner Cable -- they paid like a
21 quarter of a billion dollars to acquire the
22 Dodgers rights, with the thought being DirecTV
23 had huge penetration in the Los Angeles market,
24 and it's worth forcing DirecTV to either have
25 this price -- pay this price or perhaps we'll

1 win back customers for DirecTV if they don't
2 take it.

3 And \$5 was just a bridge too far. So
4 at Charter, for instance, we only had about
5 250,000 customers in the outlying L.A. DMA --
6 we had Long Beach and Malibu. We had about
7 250,000 in the L.A. DMA, and we just -- it was
8 too much.

9 So what we did was we budgeted -- in
10 October before the network launch, we budgeted,
11 we'll launch it in August if we're losing
12 customers. So let's not launch it opening day.
13 We just can't put another 5 on top of the 4 on
14 top of what we're still paying Fox, even after
15 a slight reduction for Fox losing the games.

16 And -- but if we're really bleeding
17 subscribers, we'll do the math exercise that
18 you were alluding to earlier, is it worth
19 putting on.

20 JUDGE STRICKLER: Well, that
21 anticipates what I think is sort of the
22 important question that I -- that comes up, is
23 since this is -- this phenomenon of price
24 resistance, the -- Comcast saying no, if you
25 will, to the Yes Channel, to the Yankee

1 channel, and Charter saying no to the Dodgers,
2 and any other similar ones that you recall
3 given your background in the industry, has
4 there been a loss in subscribership because of
5 the decision not to carry the Yankees on
6 Comcast or the Dodgers on Charter or any of the
7 other situations where that happened? Is the
8 jury still out on that or is there some
9 information in that regard?

10 THE WITNESS: It's a little bit inside
11 baseball.

12 JUDGE STRICKLER: It's a metaphor I
13 assume at this point.

14 THE WITNESS: So we bought Time Warner
15 Cable. And our feeling is that DirecTV is
16 losing subscribers.

17 JUDGE STRICKLER: DirecTV is losing
18 subscribers?

19 THE WITNESS: Yes, DirecTV --

20 JUDGE STRICKLER: Your rival?

21 THE WITNESS: Well, we bought Time
22 Warner Cable so we inherited the Dodgers deal.

23 JUDGE STRICKLER: Okay. But you --
24 okay. I'm done. Go ahead. I'm sorry.

25 THE WITNESS: And the thought, the

1 thought is that they are losing some
2 subscribers --

3 JUDGE STRICKLER: "They" being
4 DirecTV?

5 THE WITNESS: Yes, sir. I'm sorry.

6 JUDGE STRICKLER: The competitor of
7 Time Warner?

8 THE WITNESS: Right. Who have not
9 carried the Dodgers, and the Dodgers also
10 became -- have been a successful team. They
11 were in the World Series. But it's un- -- the
12 jury, I think, is still out. The jury is still
13 out about whether or not it's painful enough
14 that they don't want to continue to carry.

15 We have -- I had a couple RSNs that
16 were up before I left the company, and we
17 determined that we still needed to carry them,
18 even though they were giving us a 15 percent
19 step-off new license fee to keep the carriage.

20 JUDGE STRICKLER: Have you ever
21 answered one of the Bortz surveys?

22 THE WITNESS: No, I've never answered
23 one of the Bortz surveys. I'm not a local
24 field leader.

25 JUDGE STRICKLER: Have you read the

1 Bortz survey?

2 THE WITNESS: I have read the Bortz
3 survey.

4 JUDGE STRICKLER: So you're familiar
5 with -- if I just reference Question 4 of the
6 question about relative value, are you familiar
7 with that question?

8 THE WITNESS: Yes, I'm familiar with
9 that question.

10 JUDGE STRICKLER: If you were given
11 what you know -- if you were answering it about
12 this period now, where there is this price
13 resistance going on --

14 THE WITNESS: Yes, sir.

15 JUDGE STRICKLER: -- would the
16 existence of that price resistance cause you to
17 say that sports, overall, has a lower relative
18 value compared to other -- other types of
19 programming compared to the situation when you
20 didn't have that price resistance?

21 THE WITNESS: We're talking today?

22 JUDGE STRICKLER: Yes.

23 THE WITNESS: Today I -- today I would
24 -- today I would be more thoughtful about it.
25 Today I would be a little more thoughtful about

1 it, but I still -- I still -- and I bought
2 sports rights for Comcast. I was head of
3 sports rights acquisition for this giant,
4 really buttoned-down company that doesn't spend
5 money very freely. So maybe I come a little
6 bit from that perspective. I don't think so.

7 JUDGE STRICKLER: You don't think so,
8 what? I'm not sure.

9 THE WITNESS: I don't think I'm
10 prejudiced towards sports. I think I'm pretty
11 pragmatic about it.

12 JUDGE STRICKLER: Well, I wasn't
13 asking about your prejudice. Whether you were
14 just -- given --

15 THE WITNESS: No.

16 JUDGE STRICKLER: Given the impact of
17 the price resistance saying this game, if you
18 will, is not worth the candle, so we're not
19 going to air it, the fact that that exists as
20 an alternative choice, does that impact at all
21 the relative value you would give to sports
22 compared to the other program categories?

23 THE WITNESS: Not in the Bortz survey,
24 not in the Bortz survey.

25 JUDGE STRICKLER: Why not?

1 THE WITNESS: Because -- because what
2 we've talked about has an impact. Well, WGNA
3 -- let's say WGNA still had sports today.
4 Let's say the Bortz survey today was what it
5 was then with WGNA still having sports.

6 It wouldn't change -- it wouldn't
7 change the way I would answer the Bortz survey,
8 even today, even given a little bit of the
9 uncertainty, the pressurization you're talking
10 about, because WGNA still has the same sports,
11 the same number of sports games at the same
12 really decent value proposition. It's rather
13 inexpensive in the sports scheme. It's really
14 inexpensive in the sports scheme.

15 And to really get back to it on
16 distant signals, even without WGNA, the reason
17 we're carrying -- bringing distant signals into
18 markets when this type of pressure is because
19 of sports.

20 When I have the opportunity to drop a
21 distant signal, the person that runs broadcast
22 relations to me, if I hear that there is some
23 distant signals being carried, I'm -- and we're
24 out of contract or there's an opportunity to
25 reevaluate the decision, I'm saying to her:

1 Why are we not dropping that? Why are we
2 paying for that?

3 And she would then go to the field
4 leader, who is the person that's responsible
5 for this type of decision, because I don't know
6 what those call signs are, and I can look up
7 the call signs, you know, on the Bortz survey
8 and it says WTIV, WRXS. I don't know what that
9 means in Madison, Wisconsin. I can look it up
10 but I still don't have the knowledge that the
11 local field programming leader has.

12 So she calls the local programming
13 person, and they come back and they have to
14 give me a reason why we're not dropping it, why
15 they've made the decision. And it's sports.
16 It's that I'm in Wisconsin, and whatever the
17 DMA is, I'm getting from Fox NFC games for the
18 Packers, but I have all these fans of the
19 Chicago Bears, we've had Chicago Bears games in
20 this market forever, and I've got to spend all
21 this money because I'm going to lose customers
22 if I'm not bringing this Bears Fox feed into
23 this DMA -- into this marketplace.

24 Similarly, if we challenge somebody
25 why are they bringing this Minnesota station

1 in, I have to have the Gophers or I have to
2 have Minnesota Duluth Hockey. There's 20
3 games. It's worth the money. If I don't have
4 the 20 games of the hockey team, I could lose
5 customers.

6 Those were the types of answers that I
7 was getting when I was challenging people to
8 take it off. So even in today's world with all
9 this higher-level pressure, if we were looking
10 at distant signals, I don't think it changes
11 the equation, even today.

12 JUDGE STRICKLER: Thank you.

13 BY MR. CANTOR:

14 Q. Mr. Singer, you were talking a bit
15 about the Bortz survey. And have you reviewed
16 the written testimony of Program Supplier
17 witness John Mansell?

18 A. Yes, I have.

19 Q. So Mr. Mansell writes about what he
20 calls a proliferation of regional sports
21 networks, or RSNs --

22 A. Yes.

23 Q. -- and suggests that the proliferation
24 of those networks de-valued or limited the
25 value of sports on distant signals or team

1 sports on distant signals.

2 Do you have a view of his -- his
3 testimony in that regard?

4 A. Mr. Mansell wrote a report that really
5 accurately describes how compelling sports
6 programming is and how expensive it is. Since
7 2002, 2003 there has been migration of sports
8 to new sports networks, which we've talked
9 about today, the Judges and I have been talking
10 about today. Much of that has been from one
11 broadcast -- excuse me, one paid -- paid sports
12 tier by an ESPN package, or an RSN package to
13 another paid package, more so than the
14 migration from broadcast.

15 There has been some migration of the
16 last bits of sports that's on broadcast to
17 RSNs, when RSNs renew the rights, but it hasn't
18 been that significant. It's not unique to this
19 time period. It has been an ongoing process.

20 And I think with respect to this
21 hearing here, it's irrelevant. It didn't --
22 that type of migration, which has been going on
23 since 2001 or '2, didn't impact WGN, which
24 consistently had the 109 to 120 games. And it
25 also didn't impact my discussion with the

1 Judge, which is if I was having that discussion
2 with a field leader and she said to me, oh, the
3 reason we have it on is because we used to
4 carry this because they had the last ten
5 Brewers games, and I want to bring Brewers
6 games in, we'd drop it if there wasn't that
7 compelling reason anymore.

8 So I don't think it impacts these
9 particular distant signals or this distant
10 signal would have been dropped.

11 JUDGE STRICKLER: I have a question
12 for you.

13 THE WITNESS: Yes, sir.

14 JUDGE STRICKLER: Taking it away from
15 the actual distant retransmission market to
16 what I'll refer to and is referred to in these
17 proceedings as the hypothetical market, if you
18 had to negotiate separately with the individual
19 programming owner, program owners, Copyright
20 Owners of the programs that are on, let's stick
21 with WGNA for the moment, and you had to
22 negotiate separately with Chicago Cubs, Chicago
23 White Sox, Chicago Bulls and all the other
24 distributors of programs, do you think that the
25 -- the owners of the sports, which, as you say,

1 drives the decision to carry the retransmitted
2 stations, if you had to negotiate with them
3 separately, do you think they, like the other
4 sports leagues and other sports distributors,
5 would also try to take for themselves the value
6 that you see in the retransmitted station,
7 knowing that that's on the table, and take as
8 much of that away from -- from you as possible?

9 THE WITNESS: I negotiated with
10 Mr. Reinsdorf, who owned the Bulls and the
11 White Sox, and with the then Tribune ownership
12 for the Cubs to create Comcast Sports Net
13 Chicago. They would look for every crumb.
14 They, understandably, as businesspeople would
15 try to maximize the money that they could
16 obtain.

17 It's hard to answer because I know
18 it's just a hypothetical, but, you know, this
19 is such a unique corner case, the last historic
20 super-station and how it came to be and how it
21 got distributed.

22 And so it's hard to answer the
23 hypothetical, but, yeah, I think the sports
24 teams in a direct conversation that you want to
25 have Cubs games in Florida, or out of market

1 in, you know, Milwaukee, yeah, I think they'd
2 be very aggressive.

3 JUDGE STRICKLER: I appreciate what
4 you said. And you can say it's hard to answer
5 it, but it sounds like, given your experience
6 and your testimony, you really do have an
7 answer because you did negotiate with
8 Mr. Reinsdorf about these very items when they
9 were moved into a cable system rather than onto
10 -- into a distantly retransmitted station, so
11 you know exactly how they negotiate --

12 THE WITNESS: Yeah.

13 JUDGE STRICKLER: -- when they have
14 the opportunity to disaggregate, unbundle out
15 of the retransmitted station, and negotiate
16 solely on their own behalf?

17 THE WITNESS: Yeah, just to be clear,
18 when we created Comcast Sports Net Chicago or
19 NBC Sports Chicago today, they were moving
20 their product from a regional sports network
21 that was owned by Cablevision and we were
22 starting our own -- our new regional sports
23 network.

24 So the four teams were just moving
25 from one Chicago RSN to creating their own RSN

1 with Comcast. It wasn't impacting this type of
2 discussion.

3 JUDGE STRICKLER: And in the
4 hypothetical situation, which is analogous to
5 what you're saying is the real situation when
6 they migrated away into cable, would the
7 bargaining strategy of the White Sox and the
8 Bulls to take every crumb, to use your word,
9 that they could get, would that reduce the
10 value of sports to -- to -- relative to a
11 situation where it was just where they weren't
12 seeking as much and that you would be able to
13 keep the residual?

14 THE WITNESS: Taking every crumb is
15 not -- you know, that wasn't fair to say.
16 They're just being aggressive businesspeople
17 and maximizing the value of their asset, but we
18 were having sort of a colloquial conversation.

19 At the end of the day, two
20 businesspeople aren't going to do the agreement
21 unless there's some value to both sides. So
22 they're not -- they're not strangling the
23 business entirely.

24 At a Comcast Sports Net was a good --
25 Chicago was a good business, even though we

1 paid really high rights fees to our partners.

2 It was a real -- it was a good business.

3 And even though we charged a lot of
4 money for the channel to the distributors, they
5 still had a lot of value. It had a value
6 proposition that was still favorable to
7 distributors. They wanted it on. They wanted
8 to carry it.

9 JUDGE STRICKLER: Thank you.

10 BY MR. CANTOR:

11 Q. Mr. Singer, we've been talking about
12 the testimony of Mr. Mansell, and when we were
13 talking you had mentioned that, I believe, that
14 you looked at the number of games that were
15 carried, team sports games that were carried on
16 WGNA in the period of 2004 and 2005 --

17 A. Yes.

18 Q. -- versus 2010 to 2013.

19 A. Yeah.

20 Q. Is that right?

21 A. Yes. And it stayed static. It stayed
22 static.

23 Q. And did Mr. Mansell in his testimony
24 -- I know he was talking about regional sports
25 networks and the evolution of the market. Did

1 he talk about how the market was evolving at
2 the same time with regard to general
3 entertainment networks?

4 A. No, he didn't. And I haven't seen
5 much discussion about that. And I think it's
6 pretty important to bring up with the Judges
7 that during this time period, I've talked about
8 the importance of the availability of product
9 and if it's unique and exclusive or
10 quasi-exclusive on one location, importance of
11 whether it's live or not, at the same time that
12 I was describing, for instance, 30 Rock being
13 available on NBC, on local broadcasting, and on
14 Comedy Central, we have a proliferation of
15 streaming services such as Netflix and Hulu
16 which are just taking off. And I think 30 Rock
17 might have even been on one of the streaming
18 services as well.

19 And we also have a proliferation of
20 on-demand offerings in which this type of
21 content, prior seasons, is being provided by
22 cable companies as part of the value
23 proposition, so you had prior seasons in a VOD
24 library.

25 So the -- the necessity of carrying

1 Program Suppliers content becomes less and less
2 because not only is it available on many
3 different platforms, broadcast and
4 multi-channel television, but it's also now
5 susceptible so much to recording, to
6 availability on-demand, and to availability on
7 streaming services.

8 So dropping, not carrying a network
9 that has some popular, as reflected in Nielsen
10 ratings, programming, becomes less an issue if
11 many of my customers have Netflix and it's
12 available on Netflix.

13 Q. Did you also review the written
14 testimony of Program Suppliers witness
15 Professor Joel Steckel?

16 A. I did, yes.

17 Q. And Mr. -- or Dr. Steckel testifies
18 that the act of trying to value different types
19 of programming would, in his words, be
20 unfamiliar to a cable industry executive
21 because cable operators purchased rights on a
22 system-wide basis -- you know, for the whole
23 station or whole signal rather than on a
24 program basis.

25 Do you have a reaction to his

1 testimony on that point?

2 A. I think, as I -- as it has come up
3 tangentially with the Judges here, yes, I
4 disagree with that. I think that's not what
5 people are buying. That's not what these
6 executives are looking at.

7 They understand the components of the
8 networks and the quality, which is -- I don't
9 want to belabor the point, which I think we
10 already made.

11 Q. And have you also reviewed the
12 testimony of Program Supplier witness Sue Ann
13 Hamilton?

14 A. Yes.

15 Q. And Ms. Hamilton criticizes the Bortz
16 survey, among other things says that the
17 categories that are used in the Bortz survey
18 and that are used in this proceeding would be
19 confusing to cable operators.

20 Do you have a view as to her testimony
21 on that issue?

22 A. I don't think they are confusing at
23 all.

24 Q. And why not?

25 A. I think it's straightforward. I think

1 -- I can't see them being much more
2 straightforward. If they were different,
3 people would be complaining that they weren't
4 straightforward enough.

5 Q. And Ms. Hamilton also in her testimony
6 asserts that the audience viewing is the most
7 appropriate measure of relative value of
8 programming.

9 In your experience in the -- working
10 with a cable operator, is there a one-to-one
11 correlation between audience viewing levels and
12 value?

13 A. There is clearly not. ESPN is
14 getting, at this period of time, four to five
15 -- approximately four to five dollars, and the
16 equally popular by viewership, by Nielsen
17 viewership, networks are receiving, you know,
18 pennies versus the dollars.

19 Similarly, we talked about TNT. Yet
20 TNT is a popular general entertainment network.
21 It's only receiving about a third of what ESPN
22 -- one ESPN service. So there's absolutely not
23 a one-to-one correlation.

24 And if you look at the marketplace,
25 what the biggest media companies are paying for

1 sports at this period of time and what
2 distributors are then paying for sports
3 vis-a-vis other categories of programming, the
4 marketplace says that Nielsen ratings, although
5 a component in trying to evaluate value, is not
6 a critical component.

7 JUDGE STRICKLER: Mr. Singer, you said
8 there's not -- so you answered counsel question
9 by saying there's not a one-to-one ratio.

10 THE WITNESS: Absolutely not a
11 one-to-one ratio.

12 JUDGE STRICKLER: Is there a ratio?

13 THE WITNESS: It's a component. It's
14 a component in looking at popularity. So I've
15 talked about passion. I talk to passion,
16 signature programming, and I've talked about
17 availability.

18 And one of those categories, it's a
19 component and it can absolutely show -- the
20 Superbowl is one of the most highly rated
21 shows. And some premium -- some great show on
22 broadcast television that rates well, yes, it's
23 important and it shows passion, but it's still
24 -- it has a limited correlation and can have a
25 confusing correlation because you can have

1 something that receives a Nielsen rating that,
2 as we've talked about, is undifferentiated.

3 There's tons of these types of
4 programs on. It's available on many, many
5 platforms. You can watch this particular show,
6 as we've talked about, on many, many channels.

7 So it's a component. And it's a
8 factor. And you want to have popular
9 programming, but that's all it is, is a
10 component. And it's -- I don't think it's the
11 best indicator in any way.

12 JUDGE STRICKLER: How important a
13 component is it?

14 THE WITNESS: It's an important
15 component because it does reflect popularity.
16 You want popular programming, but even that's
17 confusing. I would rather have Mad Men on -- I
18 would rather have Mad Men on, which is getting
19 a 2 rating, than have -- so it's popular but
20 it's not widely popular, given Nielsen ratings,
21 than some undifferentiated movie.

22 JUDGE STRICKLER: Because that will
23 drive subscribership --

24 THE WITNESS: Yes.

25 JUDGE STRICKLER: Mad Men will drive

1 the subscribership, which is the bottom line
2 for the cable company, as opposed to something
3 undifferentiated movie with a higher viewing?

4 THE WITNESS: Yes, sir. Yes, sir.

5 JUDGE STRICKLER: Thank you.

6 MR. CANTOR: I have no further
7 questions, Mr. Singer. Thank you.

8 THE WITNESS: Thank you. Thank you.

9 JUDGE BARNETT: Cross-examination for
10 Mr. Singer?

11 MR. STEWART: I have.

12 JUDGE BARNETT: Mr. Stewart?

13 CROSS-EXAMINATION

14 BY MR. STEWART:

15 Q. Good morning, Mr. Singer. My name is
16 John Stewart and I'm here representing the
17 Commercial Television Claimants group.

18 A. Hi, Mr. Stewart.

19 Q. I just wanted to follow up on a
20 conversation you had with Judge Strickler.
21 First, is it fair to say that during the course
22 of your career you've had two very different
23 kinds of jobs, one working at, in effect, CSOs
24 and acquiring programming and, on the other
25 hand, creating programming to sell to CSOs. Is

1 that right?

2 A. Yes, but I think in the latter case, I
3 was still trying to do the same valuation
4 calculation because, for instance, at Oprah, I
5 created the rate card. We had inherited a free
6 network from Discovery Health.

7 And I was trying to, as a business
8 person, maximize how much money we could get
9 while still keeping the 80 million subscribers
10 and not having people drop the network. So in
11 doing that, I'm trying -- I'm trying to
12 evaluate this. How would I look when I was
13 wearing the other hat?

14 Q. Understood. But I just want to be
15 clear about the two different functions. And
16 so when you were talking about negotiating with
17 Turner and ultimately acquiring an array of
18 channels, that was in your capacity for Charter
19 as in effect a CSO acquiring those channels; is
20 that right?

21 A. Yes, sir.

22 Q. When you were talking about
23 negotiating with the White Sox to create this
24 new version of the regional sports network in
25 Chicago, that was your other job, wasn't it?

1 That was when you were with Comcast and you
2 were creating channels for distribution to
3 CSOs; is that right?

4 A. Yes, sir.

5 Q. And is it your experience that CSOs
6 themselves generally look for someone else to
7 create the channels and just acquire channels
8 as opposed to going into the market, an
9 individual CSO, and creating a new channel by
10 negotiating directly with individual Copyright
11 Owners or program owners?

12 A. At the time period in question, that's
13 substantially accurate. The exception might be
14 the regional sports network space.

15 Q. To the degree that some large MSOs
16 were able to create their new regional sports
17 networks of their own; is that right?

18 A. Yes, sir.

19 Q. And then they would license them to
20 other CSOs; is that right?

21 A. Yes, sir.

22 Q. Okay. Thanks. That's all I have.

23 JUDGE BARNETT: Mr. Lutzker?

24 CROSS-EXAMINATION

25 BY MR. LUTZKER:

1 Q. Good morning, Mr. Singer.

2 A. Good morning. Hi.

3 Q. Hi. My name is Arnold Lutzker and I
4 represent the Devotional Claimants in this
5 proceeding.

6 A. Hi.

7 Q. And I want to follow up on the point
8 you just made in referencing your experience
9 and working with Oprah and starting the O
10 Network. Could you just briefly describe what
11 your responsibilities were there?

12 A. I was executive vice president of
13 distribution and strategy. The Oprah Winfrey
14 Network was a joint partnership between
15 Discovery Communications and Oprah.

16 Discovery had a network with 80
17 million subscribers, which is pretty widely
18 distributed, called Discovery Health Network
19 that didn't have -- didn't receive a license
20 fee. It only had advertising revenue.

21 And Oprah took over half the channel
22 and ran it and programmed the channel. My job
23 was, in part, to convince distributors to
24 continue to carry what they had bought as
25 Discovery Health as OWN and to go from a zero

1 license fee to a reasonable license fee, given
2 the Oprah programming.

3 Q. And you worked with Oprah in terms of
4 creating the programming mix for the network?

5 A. I would love to say that I did. I was
6 right at her elbow every day but, no, I didn't.

7 Q. Was she the driving force of the
8 decisions for the network?

9 A. Ultimately, she was the driving force,
10 yes, sir.

11 Q. To what degree did Oprah's views of
12 spirituality have an impact on the network's
13 distribution and strategy and its program
14 schedule?

15 A. Part of the transition from Discovery
16 Health, which had a content description that
17 said it would be a channel about health and
18 wellness, was to emphasize that we would
19 continue to be meeting that contractual
20 language because Oprah's whole programming
21 philosophy is to live your own life -- to live
22 your best life, a component of which is
23 spirituality.

24 Q. And what was Soul Sunday?

25 A. You got me. I'm sorry. I don't know,

1 sir.

2 Q. You don't -- you don't know, okay. In
3 terms of the comments you made about sort of
4 the differentiated programming you spoke about,
5 passion, signature programming availability,
6 and the like, and in this context you have also
7 identified a number -- and essentially endorsed
8 a number of prior comments made by other
9 representatives, sort of with positions
10 relatively similar to yours.

11 Among those in particular, I noted
12 Judith Meyka, who had worked at TCI and some
13 other places, and I don't know whether you sort
14 of --

15 A. She worked for me.

16 Q. She worked for you. And you reviewed
17 her testimony in the 2004 to '5 proceeding, did
18 you not?

19 A. I did, sir.

20 Q. And you essentially, in your testimony
21 endorsed, the elements of what was her
22 testimony in the 2004 to '5 proceeding; is that
23 correct?

24 A. Sir, I read Judy Meyka's written
25 testimony. I never read any of her oral

1 testimony, but I did sign off and agree with
2 her testimony then.

3 Q. And in her testimony, she describes
4 the signature programming much like you do,
5 that sports drives a lot, but she had a
6 notation in her testimony as well, which you
7 may recall, that recognized to a lesser extent,
8 there are certain other program categories that
9 drive subscribership retention and support.
10 And among those she mentioned was devotional
11 programming.

12 Do you recall that?

13 A. I do.

14 Q. And would you agree with that concept?

15 A. To the same type of limited nature,
16 yes.

17 Q. Okay. And when we talk about limited
18 nature, I mean, even under the Bortz analysis
19 that you've essentially endorsed, the
20 devotional shares is about a tenth the share of
21 the sports. So we're not talking about big
22 programming, but we are talking about
23 programming that helps cable operators retain
24 or attract subscribers.

25 And I think you were talking in the

1 2010 to '13 period, particularly about
2 retention --

3 A. Yes, sir.

4 Q. -- of subscribers. And would you say
5 that devotional programming fits that niche for
6 cable operators?

7 A. I agree with results of the Bortz
8 survey as they relate to devotional and as
9 that's reflected in your question, yes.

10 Q. Great. And turning to some of the
11 questions that Judge Strickler asked about the
12 cost and profitability, would it be reasonable
13 to say that in some instances low-cost
14 programming can go better in the sense to the
15 bottom line, the profitability, of cable
16 operators than some of this very high cost
17 programming?

18 A. Yes, sir.

19 Q. And devotional programming might fit
20 into that low-cost category as far as you're
21 concerned?

22 A. It does, sir.

23 Q. Okay, thank you.

24 And sort of continuing along this
25 theme, you talk about sports and the passion

1 that fans have for sports programming. And you
2 don't look at ratings. You look at sort of the
3 share that you're able to garner from when you
4 retransmit WGN Cubs fans or in the New York
5 area, I grew up in the New York area, the
6 Yankees, the Mets, the Giants, and so forth.

7 And so there's passion among there,
8 regardless of ratings, and they tend to fill
9 stadiums.

10 A. Right.

11 Q. And that -- that becomes indicia for
12 you about value to the cable operators. Would
13 that be true?

14 A. Yes, sir.

15 Q. Now, turning to my relatively smaller
16 group in this context, there are religious
17 ministries that fill sanctuaries with thousands
18 if not tens of thousands of worshippers. And
19 I'm thinking here of some of the younger
20 ministers like Joel Olsteen, who becomes
21 extremely popular during this time period, but
22 legendary ones, worked with Reverend Robert
23 Schuller. We note yesterday the passing of
24 Billy Graham.

25 And I'll add Billy Graham's royalties

1 are at stake in these proceedings going back,
2 in fact, to the 1999 to 2009 period where we're
3 hopefully awaiting sort of final resolution
4 there, but, unfortunately, his ministry will
5 receive whatever share the religious parties
6 get. But these programs, these legendary
7 individuals draw subscribers for cable
8 operators, do they not?

9 A. I don't know if they draw subscribers,
10 but this programming has been part of the
11 subscription offering and with Reverend Graham
12 looking down upon us, I would agree that it's
13 an important genre of programming to have on
14 the cable system and that, absent this type of
15 programming, one could lose a customer.

16 Q. And -- and I noted in I think it was
17 The Washington Post obituary today that there
18 is one phrase that caught my eye, that Billy
19 Graham said, above all, go to church. That was
20 one of his central messages.

21 And for cable subscribers who can't
22 attend the crusades or can't go to the Crystal
23 Cathedral or the Lakewood Church, being able to
24 see on television through the cable
25 subscriptions becomes an important way that

1 they can go to church. Would that not be the
2 case?

3 A. For a segment of our customers, it's
4 important, yes, sir.

5 Q. Thank you. You've talked a lot about
6 WGN, WGNA. Have you actually watched the
7 channel? Are you familiar with the programming
8 on that channel?

9 A. That's the most loaded question yet,
10 but, yes, I have seen the programming on WGNA.

11 Q. And I assume from what you've been
12 saying that you've watched some of the ball
13 games on there?

14 A. Yes, I've seen some ball games.

15 Q. Have you ever watched newscasts?

16 A. I've seen the newscasts on there, but
17 I haven't stopped. But I do know there's
18 newscasts on there.

19 Q. Are you aware that when WGNA is
20 retransmitted, the retransmission of the WGN
21 signal, that many of the newscasts are not
22 retransmitted on WGNA?

23 A. I can't answer the question, sir.

24 Q. In other words, the morning
25 newscasts --

1 A. Yes.

2 Q. -- are you aware that the morning
3 newscast is not retransmitted on WGNA?

4 A. At one point, I was aware of which
5 newscasts were coming over and which weren't.
6 Sitting here right now, I can't answer the
7 question with specificity and be assured that
8 I'm being accurate.

9 Q. But you did have some awareness that
10 WGNA, for purposes of the national
11 distribution, dropped newscasts and inserted
12 other programming?

13 A. I think that -- I believe I had that
14 understanding at one point in time, that seems
15 consistent with --

16 Q. Okay. In your rebuttal testimony, now
17 I'm turning to the question which was raised
18 relative to Ms. Hamilton's comments, she had --
19 she had made some comments, and your testimony
20 indicates -- this is in rebuttal -- that 69 of
21 86 Charter systems that carry WGNA did not
22 carry any other Tribune signal.

23 And it went to the issue of did
24 Tribune bundle WGNA --

25 A. Yes.

1 Q. -- with other Tribune television
2 stations? And Tribune is one of the largest TV
3 broadcasters in the country, is it not?

4 A. Yes.

5 Q. Okay. And so you say in 69 of 86
6 Charter systems, no bundling because we didn't
7 carry a Tribune system. So my question is what
8 about the other 17?

9 A. Well -- well, Tribune was not bundled
10 -- Tribune broadcast signals were not bundled
11 with WGN. It's not the way the transaction
12 worked.

13 I can tell you that -- and I'm being
14 accurate. I can tell you that was the case at
15 prior company I worked at. But I think you can
16 see that if you look at the carriage.

17 And there's a couple components of the
18 carriage. And that's what I was getting at. I
19 hope I'm answering your question. Cut me off
20 if I'm not.

21 So I'm telling you that it wasn't
22 bundled, but you can also see that it wasn't
23 bundled because we had about 80 some percent
24 carriage at Charter -- and that's my
25 recollection for Comcast too. It wasn't

1 ubiquitously carried.

2 And had it been bundled, you would
3 have seen -- it would have been carried
4 everywhere in the company. You're not getting
5 my retransmission consent unless you carry my
6 super-station everywhere. That wasn't the
7 taking place. So you would have seen
8 100 percent carriage.

9 Second, and I think it's more
10 interesting than where you're going, but it
11 gets to the same place, in Charter markets, we
12 had 11 markets that did not carry WGNA that was
13 carrying a Tribune broadcast signal. One would
14 think if it was being bundled, which it wasn't,
15 that someone would have come in and said: Hey,
16 you're not carrying the super-station
17 everywhere, I'll give you -- I'm going to give
18 you retransmission consent at this value
19 proposition, but you certainly have to carry it
20 in every place I have a broadcast station.

21 That wasn't happening either. So
22 those numbers in my rebuttal testimony were
23 sort of to give some independent evidence to
24 support my contention that, in fact, it wasn't
25 bundled.

1 Q. I appreciate that. And that might
2 have been Charter's experience, but at the same
3 time, there were press reports in 2012 that
4 DISH, as an example, and Cablevision were
5 engaged in negotiations and a dispute with
6 Tribune over local carriage of signals, the
7 retransmission consent.

8 A. Sure.

9 Q. You knew about that, did you not?

10 A. I knew that -- they had new management
11 come in. And they had new ownership come in
12 post-bankruptcy that took a much more
13 aggressive position than had been -- had taken
14 place before.

15 And they had disputes with those two
16 companies and they had disputes with DirecTV
17 that were widely publicized. I can't speak to
18 the details of what happened, but as you also
19 know, in this period of time, Gannett, Hearst,
20 Sinclair, all the large, powerful broadcast
21 groups were being aggressive to seek additional
22 value in retransmission consent.

23 So there were lots of these --

24 Q. Well -- I'll let you finish.

25 A. Go ahead, I'm sorry.

1 Q. Was it conceivable that your contracts
2 with Tribune sort of predated the new ownership
3 and didn't come up for renewal until -- until
4 somewhat later? So you were not engaged in
5 this -- this sort of new ownership
6 post-bankruptcy disputes that were going on in
7 2012?

8 A. That -- that is what -- that is true.
9 That's -- that's true. We didn't go to the
10 plate, another baseball analogy, until '14, '15
11 with them, but I guess the more important point
12 for what we're doing here, even if this did
13 take place in the middle of the time period
14 here around '12 or '13, what you're talking
15 about that perhaps it was starting to be
16 bundled in '12, which I'm not sure and I can't
17 testify to, I think the point -- I think the
18 point Ms. Hamilton is making on bundling is
19 it's not a true value proposition because it
20 was just tagging along; if you want Tribune,
21 you have to carry WGNA.

22 So talking about sports on WGNA is not
23 important because that's not where the value
24 was. I think she's -- I'm guessing but I think
25 that's what she's trying to do. But that -- it

1 doesn't matter so much, even if there had been
2 latter bundling, which I'm not sure there was,
3 because you can look back and say the carriage
4 in 2010 and '11, why was it on, because it
5 hadn't been bundled. It wasn't historically
6 part of a bundle, which is what I think Sue
7 Hamilton was saying.

8 So what happened perhaps during this
9 period or didn't happen during this period
10 isn't that relevant to the determination. Can
11 we take a step back and say: Why were these
12 local field leaders saying I carried WGN in the
13 Bortz survey? Which is what I think she's
14 trying to undermine. They didn't make some
15 independent decision regarding that because it
16 had been bundled as part of retrans, which
17 wasn't the case.

18 Q. But, in other words, what you're
19 saying is you don't know for the 2012 and '13
20 period. Maybe prior to -- prior to that, you
21 may have sort of more personal knowledge. Do
22 you know when the retransmission agreements
23 with Tribune -- you said expired in 2014, '15.
24 When did they start? Were they sort of prior
25 to 2010?

1 A. For me?

2 Q. Yeah.

3 A. '11.

4 Q. '11, okay. So 2010 and '11 --

5 A. There was no --

6 Q. -- you're reasonably familiar --

7 A. There was no bundling in '11.

8 Q. Okay.

9 A. There was no bundling in '08. There
10 is no bundling in '03 at Comcast. So if we
11 want to take a look at WGNA independently -- if
12 you want to -- if you want to say that the
13 Bortz survey can look at WGNA independently on
14 a market basis, it's not being impacted -- the
15 launching continued carriage. It's not being
16 impacted by bundling with retrans, contrary to
17 I think Ms. Hamilton's testimony.

18 Q. But for 2012 and '13, you have less
19 personal knowledge about the bundling?

20 A. Yes.

21 Q. Okay. Thank you.

22 And I'll note that in your, I'll say,
23 endorsement of the Bortz survey and the
24 results, there's a 4 to 5 percent range, it
25 goes from 4 in 2010 up to 5.1 in 2013, for the

1 devotional, sort of this smaller segment.

2 And that percent would be consistent
3 with your professional views of sort of if
4 you're making a judgmental allocation of
5 royalties, and you think that's a reasonable
6 allocation, do you not?

7 A. I did, sir.

8 Q. And you wouldn't see any independent
9 basis, based on your experience, for altering
10 that allocation, would you?

11 A. I would not.

12 Q. Okay. Thank you very much.

13 A. Thank you.

14 JUDGE BARNETT: Thank you,
15 Mr. Lutzker.

16 MR. LUTZKER: Thank you.

17 JUDGE BARNETT: Ms. Plovnick? How
18 long are you going to have?

19 MS. PLOVNICK: Maybe 30 minutes.

20 JUDGE BARNETT: Let's take our morning
21 recess before you get started.

22 (A recess was taken at 10:32 a.m.,
23 after which the trial resumed at 10:56 a.m.)

24 JUDGE BARNETT: Please be seated.
25 Once again, this delay is on me. I was

1 listening to music as I was on hold for ten
2 minutes.

3 Ms. Plovnick?

4 MS. PLOVNICK: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. PLOVNICK:

7 Q. Mr. Singer, my name is Lucy Plovnick
8 and I represent Program Suppliers in this
9 proceeding. Good morning.

10 A. Good morning.

11 Q. So this mic is kind of over here. I
12 suppose if anyone can't hear me, they will tell
13 me.

14 A. That's good when you stand right
15 there, we hear you best.

16 Q. You can hear me here?

17 A. Yes.

18 JUDGE BARNETT: Mr. Singer, if you
19 could pull your mic just a little closer.

20 THE WITNESS: Thank you, Your Honor.
21 Is that better?

22 JUDGE BARNETT: Yes.

23 BY MS. PLOVNICK:

24 Q. Mr. Singer, you worked at Charter from
25 2011 to 2016; is that correct?

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1 A. Yes, I left -- yes, I left in the fall
2 of 2016.

3 Q. And when you worked at Charter, you
4 were the person responsible for programming
5 decisions for Charter?

6 A. I was the person overall responsible
7 for programming at Charter, depending on what
8 the subject matter was, yes.

9 Q. You were responsible, so did you
10 supervise everyone else working under you that
11 was -- that had any responsibility for
12 programming decisions?

13 A. Yes, and I would have signed off on --
14 where it's here, if a decision was made by a
15 local programming authority.

16 Q. Did that include distant signal
17 programming?

18 A. Yes, exactly.

19 Q. So you had the authority to approve or
20 disapprove whatever decisions others were
21 making with regard to distant signal
22 programming?

23 A. I -- I did. I would challenge -- it
24 wasn't just approving -- I would challenge them
25 because I wanted to save the money. We really

1 did.

2 I would challenge them, when they
3 would come up with a basis that they would lose
4 customers, I would defer to their decision, so
5 they were making the decision subject to me
6 signing off on it.

7 Q. Did you ever overrule anyone's
8 decision or say -- you said that they had to
9 justify them to you?

10 A. Yes. I thought about that and I can't
11 remember one time when somebody -- when I did
12 overrule somebody.

13 And I would say to them, I'm taking
14 this to Tom, the CEO. And they would say,
15 fine, I really need to have this.

16 But I can't remember overruling them.

17 Q. You can't remember overruling them but
18 you could have sometime?

19 A. I could have but I don't believe I
20 did. I tried to think whether I -- what
21 instance I might have overruled someone.

22 Q. So let's talk about the programming
23 decisions that you supervised.

24 So when you make a programming
25 decision about whether to carry a distant

1 signal, it's usually a decision about whether
2 to carry an entire broadcast station; is that
3 correct?

4 A. Yes.

5 Q. You don't usually decide about a
6 particular program, within a distant signal,
7 about carriage of one program?

8 A. Well, no, you can't a la carte it, but
9 when you are looking at carrying a distant
10 signal, there has to be a reason. What's on it
11 that we need to carry? What are the components
12 of the programming on it?

13 And in this instance is there
14 something that I have to have or I'm going to
15 lose a customer? So is there a component of
16 the network --

17 Q. But you didn't individually license
18 any of those programs?

19 A. No, you cannot individually license
20 programming.

21 Q. And sometimes when you would make
22 decisions, you would look at multiple stations
23 together as in a bundle. I think you testified
24 about that.

25 A. Not in the case of distant signals.

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1 Q. Not in the case of distant signals,
2 but in the case of cable networks or other
3 things, you would look at a bundle situation,
4 you might make a decision about multiple
5 signals at the same time?

6 A. Multiple networks at the same time --

7 Q. Multiple networks at the same time.

8 A. -- that were owned by the same program
9 group, yes.

10 Q. All right. So let's talk about the
11 marketplace for distant signals.

12 So right now cable systems carry
13 distant signals pursuant to a statutory
14 license; is that right?

15 A. Section 111?

16 Q. Section 111 of the Copyright Act?

17 A. Yes.

18 Q. So cable operators do not currently
19 engage in free market negotiations for the
20 carriage of distant signals?

21 A. Well, cable -- no. Cable -- cable
22 system operators are making a determination
23 whether I want to bring a distant signal into
24 my market or not, unless I misunderstood your
25 question. So they are making a market

1 decision. It is not being driven, for
2 instance, as part of an ESPN deal.

3 Q. No, no, but it is within the 111
4 compulsory licensing, you know, the regulation
5 that exists, so the decisions that they are
6 making are being made with the understanding
7 that they are carrying it pursuant to a
8 statutory license; is that correct?

9 A. They are carrying it pursuant to a
10 statutory license, and frequently now they are
11 carrying it pursuant to a grant of
12 retransmission consent. So it would be two
13 components to it.

14 JUDGE BARNETT: What was that last
15 thing you said? I'm sorry.

16 THE WITNESS: Retransmission consent.
17 They are -- they are getting a grant to bring
18 in a distant signal from a broadcast group, and
19 then have to make a determination do I want to
20 do that and enter into that agreement.

21 And, as you are saying, consistent
22 with that I am permitted to do so under Section
23 111, which brings us here.

24 BY MS. PLOVNICK:

25 Q. But it is within this regulated scheme

1 that exists at this time during 2010 through
2 2013, there was a regulated compulsory license
3 in place for the carriage of distant signals,
4 and so the carriage that was going on was
5 pursuant to that license?

6 A. Yes.

7 Q. During that time frame?

8 A. But you would also need the grant of
9 rights from the broadcaster.

10 Q. You would also need retransmission
11 consent at the same time?

12 A. Some type of grant of rights.

13 JUDGE STRICKLER: Did you have to pay
14 separately for that retransmission grant?

15 THE WITNESS: Frequently.

16 JUDGE STRICKLER: In addition to the
17 royalties?

18 THE WITNESS: Yes, sir.

19 JUDGE STRICKLER: You say frequently.
20 But not all the time?

21 THE WITNESS: Yes.

22 JUDGE STRICKLER: And those
23 negotiations --

24 THE WITNESS: For broadcast signal you
25 would have to.

1 JUDGE STRICKLER: For a
2 distantly-retransmitted station, such as we're
3 discussing here today, you'd have to have
4 retransmission consent?

5 THE WITNESS: Generally, but not --
6 generally, yes.

7 JUDGE STRICKLER: And at times but not
8 always you would have to pay separately for
9 that retransmission of the entire station to
10 the station owner?

11 THE WITNESS: Yes, sir.

12 JUDGE STRICKLER: Thank you.

13 BY MS. PLOVNICK:

14 Q. Just to make sure we're clear, you
15 were not engaged in negotiations with either
16 broadcasters, other than these retransmission
17 consent agreements, or copyright owners in
18 order to carry distant signals from 2010
19 through 2013; it was a statutory license?

20 A. Yes, with respect to copyright, it is
21 a statutory license. And I'm sorry, I didn't
22 mean to --

23 JUDGE STRICKLER: So with respect to
24 copyright, it's the statutory license, but with
25 regard to retransmission consent, it's a

1 marketplace transaction?

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: Purely marketplace,
4 in terms of no regulation governing?

5 THE WITNESS: In terms of no
6 regulation governing, yes.

7 JUDGE STRICKLER: Thank you.

8 BY MS. PLOVNICK:

9 Q. So with -- and another feature of this
10 regulated copyright scheme --

11 A. Yes, sir -- yes, ma'am.

12 Q. -- was that you cannot alter distant
13 signals when they are retransmitted; is that
14 correct?

15 A. True. Right.

16 Q. So you can't currently insert
17 advertising into distant signals; you have to
18 take them as they are pursuant to regulation?

19 A. You're not permitted -- well, you're
20 not permitted to insert advertising. You are
21 statutorily not permitted to insert
22 advertising.

23 Cable operators and distributors,
24 other distributors, aren't permitted
25 contractually to insert into broadcast signals

1 either.

2 JUDGE STRICKLER: When a cable system
3 decides whether or not to do the
4 retransmission, enter into a retransmission
5 consent agreement, does the cable company in
6 your personal experience look at the relative
7 value of the programs that are on that station
8 before it decides whether to pay the fee to
9 retransmit the signal?

10 THE WITNESS: I might have
11 misunderstood your question.

12 JUDGE STRICKLER: Maybe I garbled it.

13 THE WITNESS: When we're evaluating
14 retransmission consent, do we look at the
15 various programming components in reaching an
16 agreement? Yes, sir.

17 JUDGE STRICKLER: Thank you.

18 BY MS. PLOVNICK:

19 Q. So when you have been talking today
20 about the 2010 through 2013 time frame and you
21 are talking about decisions with distant
22 signals, you're talking about how those
23 decisions would be made in a regulated market
24 with statutory license in place?

25 A. I -- I agree with what you are saying.

1 But there is an initial decision, do I want to
2 carry it or not, which I see as market. But
3 once we decide to carry it, I'm within the
4 regulatory environment.

5 Q. Are you talking about the
6 retransmission consent decision at that point
7 in time?

8 A. Just do you want to bring a distant
9 signal into this market and add these costs?

10 Q. But the constraints of the regulated
11 market that are in place, that would not factor
12 into that decision that you're talking about,
13 the initial decision?

14 A. It would. It would.

15 Q. So it still has the statutory license
16 inserted or involved in that?

17 A. If I am bringing a PBS in that doesn't
18 have a license fee, I'm still going to pay the
19 statutory license fee. That's your point?

20 Q. Well, I am just trying to get a clear
21 understanding of what the market is that you
22 are talking about when you are talking about
23 this, and during the 2010 through 2013 time
24 frame, which I think is what is at issue in
25 your testimony.

1 A. Yes, sir -- yes, ma'am. Sorry. I
2 apologize.

3 Q. So let me just very quickly ask you a
4 question, because I can't resist, about the
5 Oprah Winfrey Network.

6 A. I'm 0 for 1.

7 (Laughter.)

8 BY MS. PLOVNICK:

9 Q. You said that you helped, I think you
10 say you were responsible -- this is in your
11 Appendix A to your testimony under the part of
12 your resume about Oprah Winfrey Network -- you
13 were responsible for the most successful new
14 network launch in the last 15 years, increasing
15 distribution and establishing a healthy
16 affiliate revenue stream.

17 So did Oprah Winfrey Network carry any
18 sports programming?

19 A. It did not.

20 Q. It didn't?

21 A. I don't believe it did.

22 Q. All right. And you were there from
23 2009 to 2011; is that correct?

24 A. Yes.

25 Q. Okay. Now, Mr. Singer, I want to ask

1 you some questions about the Bortz survey.

2 So when you were working at Charter,
3 were you familiar with the Bortz survey?

4 A. No, I wasn't.

5 Q. And I think you testified today that
6 you never responded to the Bortz survey?

7 A. No, I never responded to the Bortz
8 survey.

9 Q. Did you ever respond to any cable
10 operator survey that was similar to the Bortz
11 survey?

12 A. I don't recall. I don't recall if I
13 ever did. I don't believe I did.

14 Q. All right. If you had responded to
15 the Bortz survey, how many Charter systems
16 would you have responded for?

17 A. I think 100.

18 Q. So you had -- oh, it was 100 different
19 Charter systems that you had authority over?

20 A. You know what, I think we had 100 Form
21 3 systems, is my recollection. My recollection
22 is the Bortz survey relates to the Form 3
23 systems?

24 Q. I believe that's right.

25 A. So I think Charter had approximately

1 100 systems that would have been responsive to
2 the Bortz survey.

3 Q. And if you had been a respondent, then
4 you would have been answering for 100 different
5 systems?

6 A. I couldn't have answered the Bortz
7 survey. I -- I couldn't. The Corporate
8 Programming Department could not have answered
9 the Bortz survey. We would have to have gone
10 to the people that responded to the Bortz
11 survey to be able to answer it.

12 Q. So you would not have considered
13 yourself an appropriate respondent to the Bortz
14 survey?

15 A. I would not have -- I am -- I am the
16 person that has overall authority over
17 programming at Charter. That's what the head
18 of programming would have been at any of these
19 companies.

20 But the actual decision, the actual
21 person responsible for deciding to carry a
22 distant signal or not in these markets would
23 have been the local programming leader there,
24 subject to my sign-off and challenge.

25 Q. So despite the fact that you were

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1 signing off and challenging these decisions,
2 you didn't think you had familiarity over the
3 different kinds of distant signal carriage that
4 the systems were carrying?

5 A. On the average Bortz survey, if there
6 is four distant signals being brought into a
7 marketplace, and it says WPVI, WXYZ, I don't
8 know what those are.

9 And I can have somebody in my
10 department Google it or I could Google it and
11 see that this is an independent or this is a
12 Fox from Chicago, but I don't know why it is on
13 until I call the system and say: Why do we
14 have that on?

15 So to really answer the Bortz survey
16 you would need the local programming --
17 designated programming leader.

18 So I would -- I would actually say to
19 Cheryl von Brecken, who is the person in
20 Minnesota, and she would say Melissa so and so,
21 and we would call Melissa and saying that's --

22 Q. You are saying that's what you would
23 have done if you had been asked to respond to
24 the Bortz survey, but you didn't actually do
25 that because you never did, in fact, respond to

1 the Bortz survey?

2 A. Yes. True.

3 Q. And you are saying you are not
4 familiar with the different call signals that
5 might be listed in the Bortz survey; you
6 wouldn't have any idea what -- what kind of a
7 signal they were, is that your testimony, or
8 what programming was on them without further
9 research and analysis?

10 A. Exactly. And I have a field leader
11 who is responsible for that type of decision.
12 So it is best to leave it to her or to him.

13 Q. All right. So you said that you
14 reviewed the 2010 through 2013 Bortz report in
15 connection with your testimony; is that right?

16 A. Yes.

17 Q. And it is your testimony that the
18 results of the Bortz report are consistent with
19 your experience as a CSO?

20 A. Yep.

21 Q. And particularly with regard to the
22 live team sports category; is that right?

23 A. Yes. Well, all the categories.

24 Q. All the categories. And you spoke in
25 particular about sports programming on WGN here

1 today, Chicago sports programming?

2 A. Yes.

3 Q. All right. So, Mr. Singer, I would --
4 and you testified that live team sports
5 programming on WGN is the most important
6 distant signal programming to cable operators?

7 A. On WGN?

8 Q. That sports programming on WGN was the
9 most important?

10 A. Yes. Yes.

11 Q. All right. Mr. Singer, I would like
12 to direct your attention to Exhibit 6020.

13 MS. PLOVNICK: And, Your Honor, this
14 is going to be a restricted exhibit. I don't
15 think we have anyone here that is not subject
16 to the protective order but I just wanted to
17 call it to your attention.

18 JUDGE BARNETT: Thank you. Let the
19 record reflect there is no one in the hearing
20 room who is not privileged.

21 (Whereupon, the trial proceeded in
22 confidential session.)

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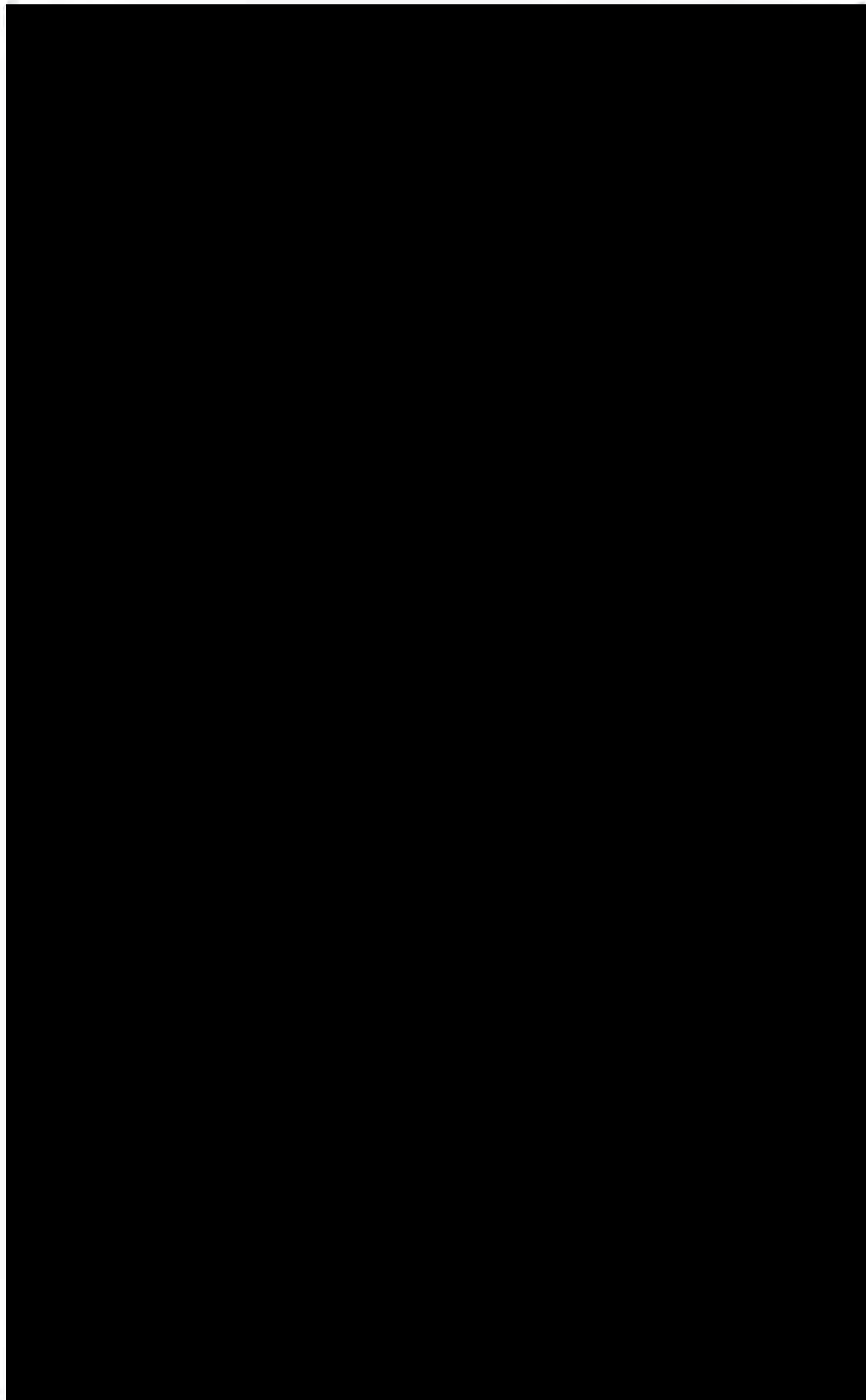
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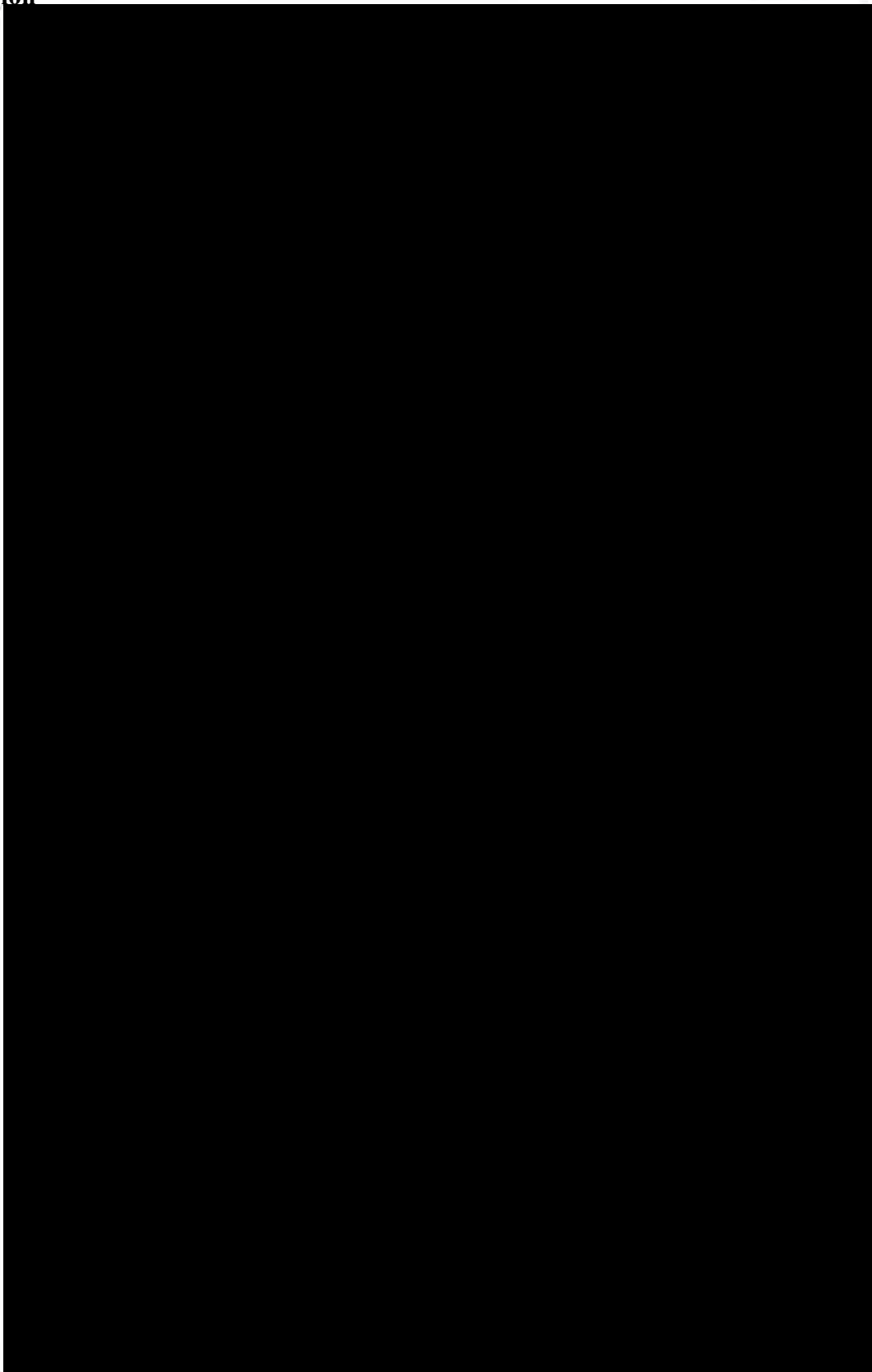
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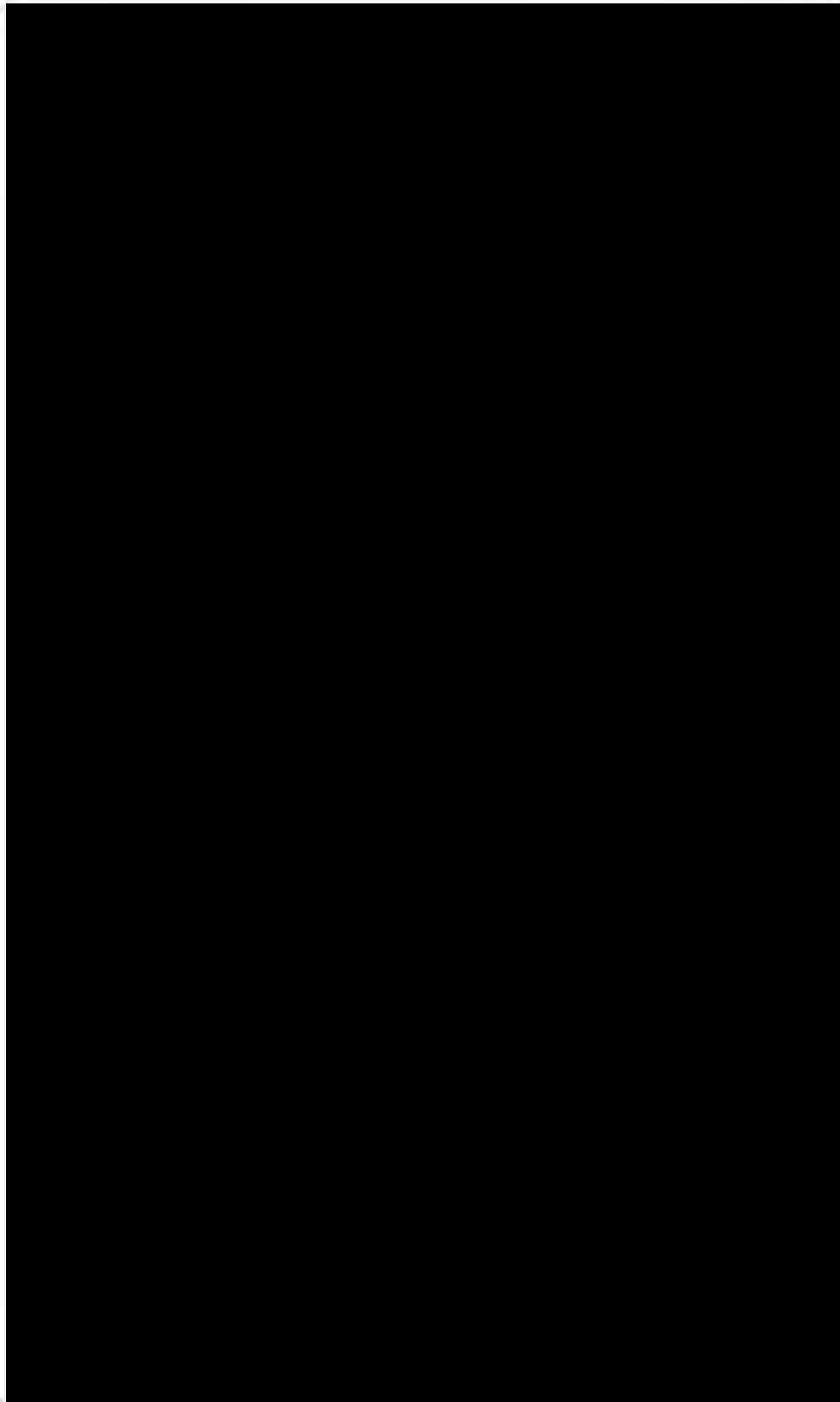


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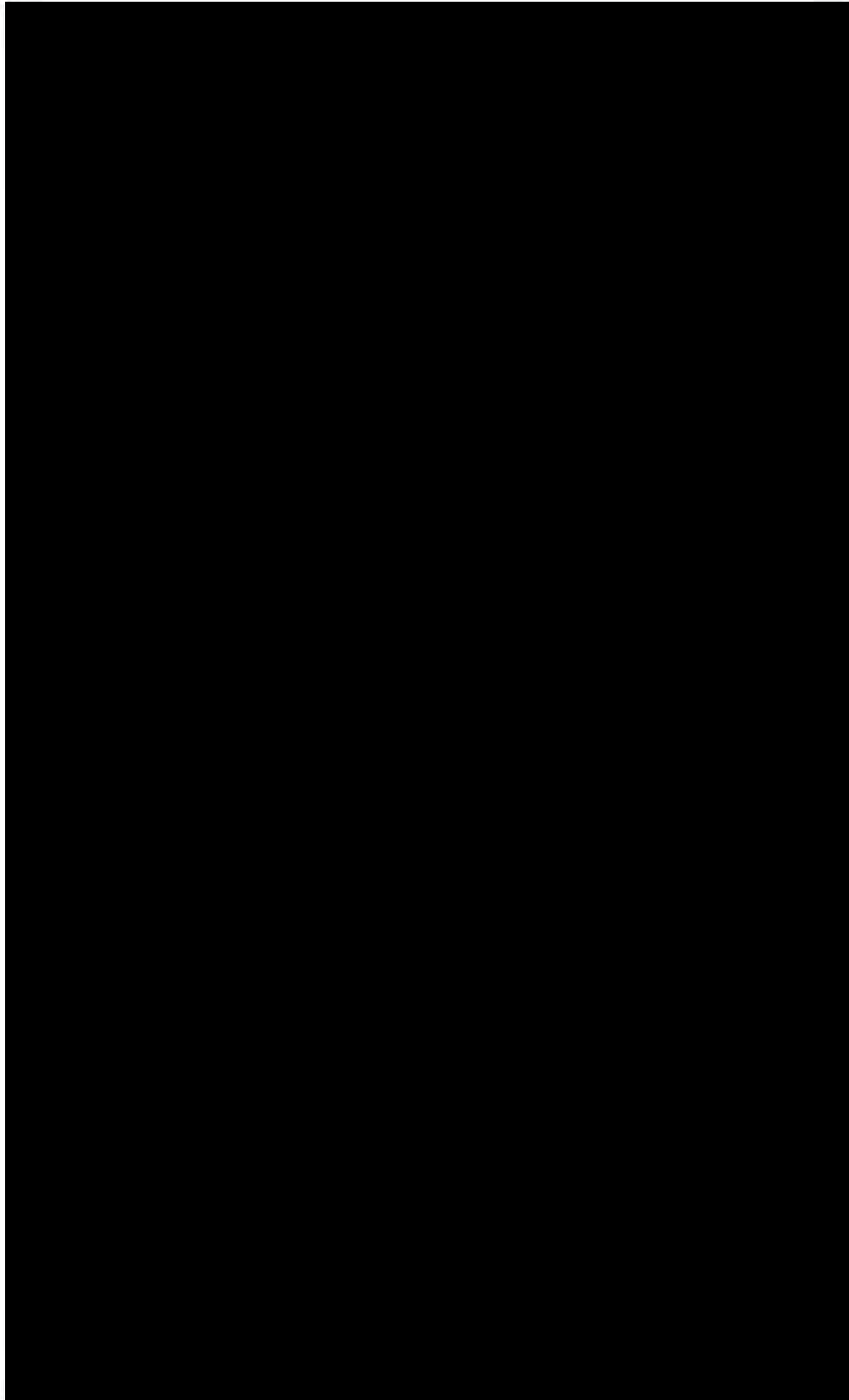


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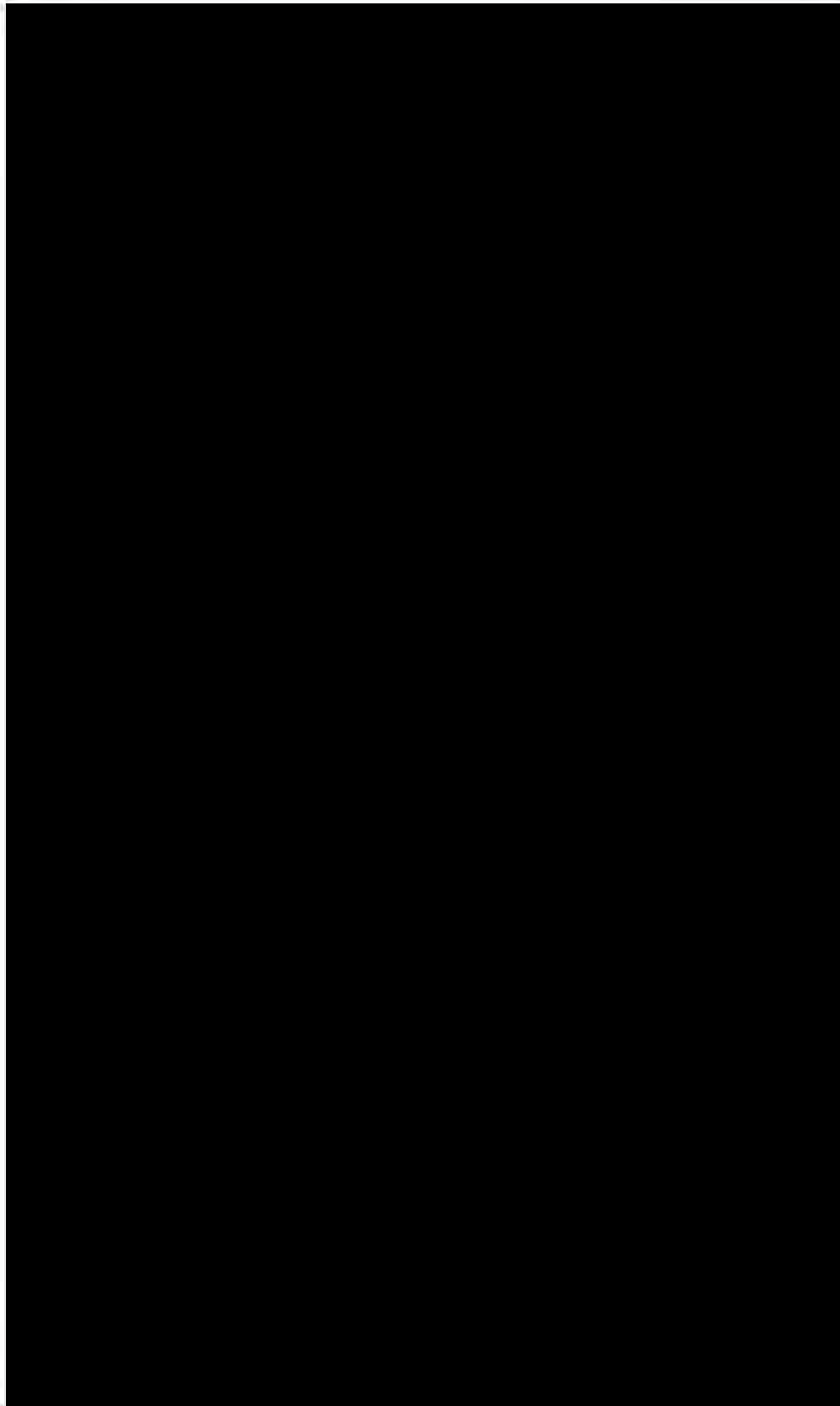


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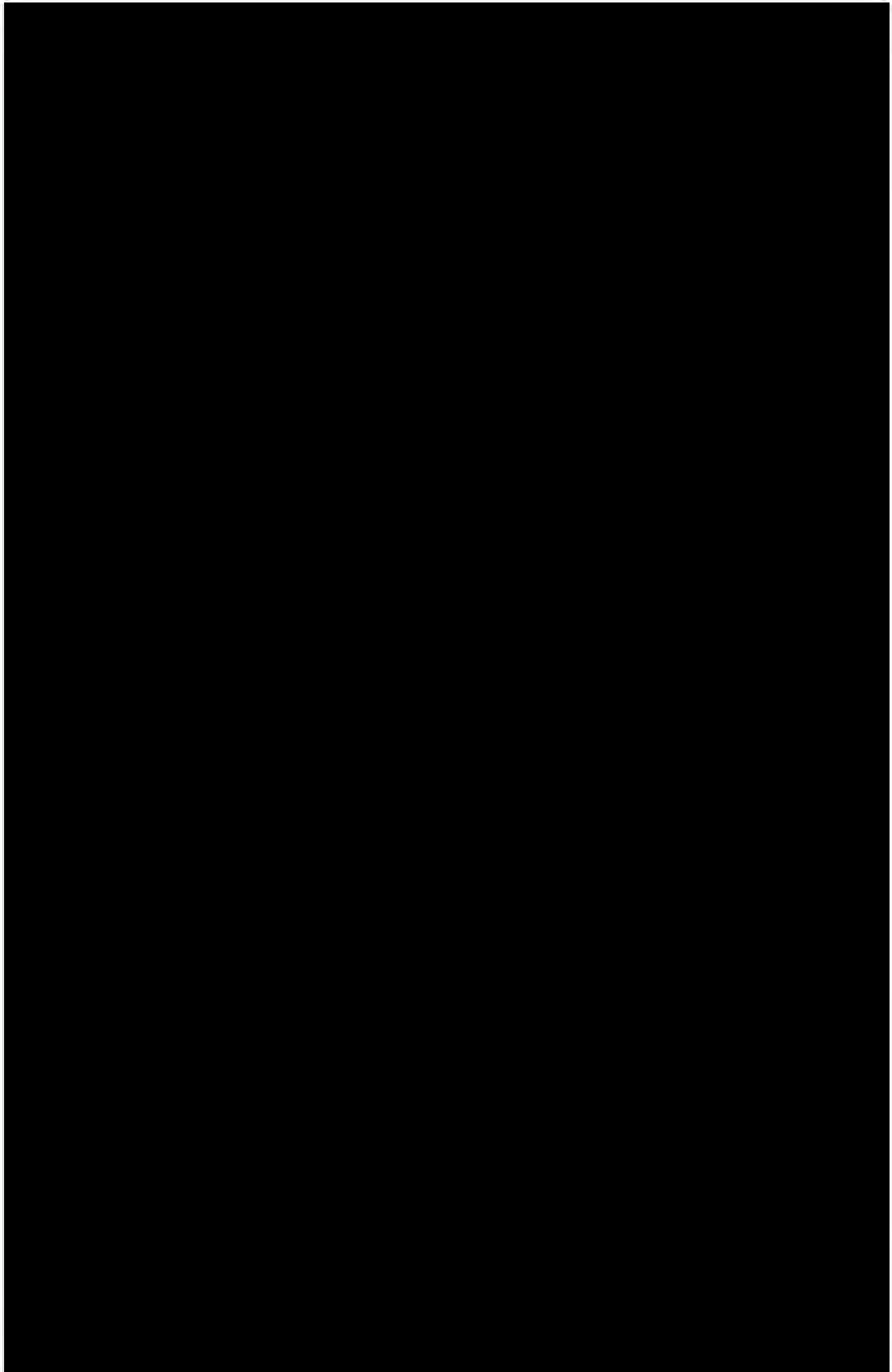
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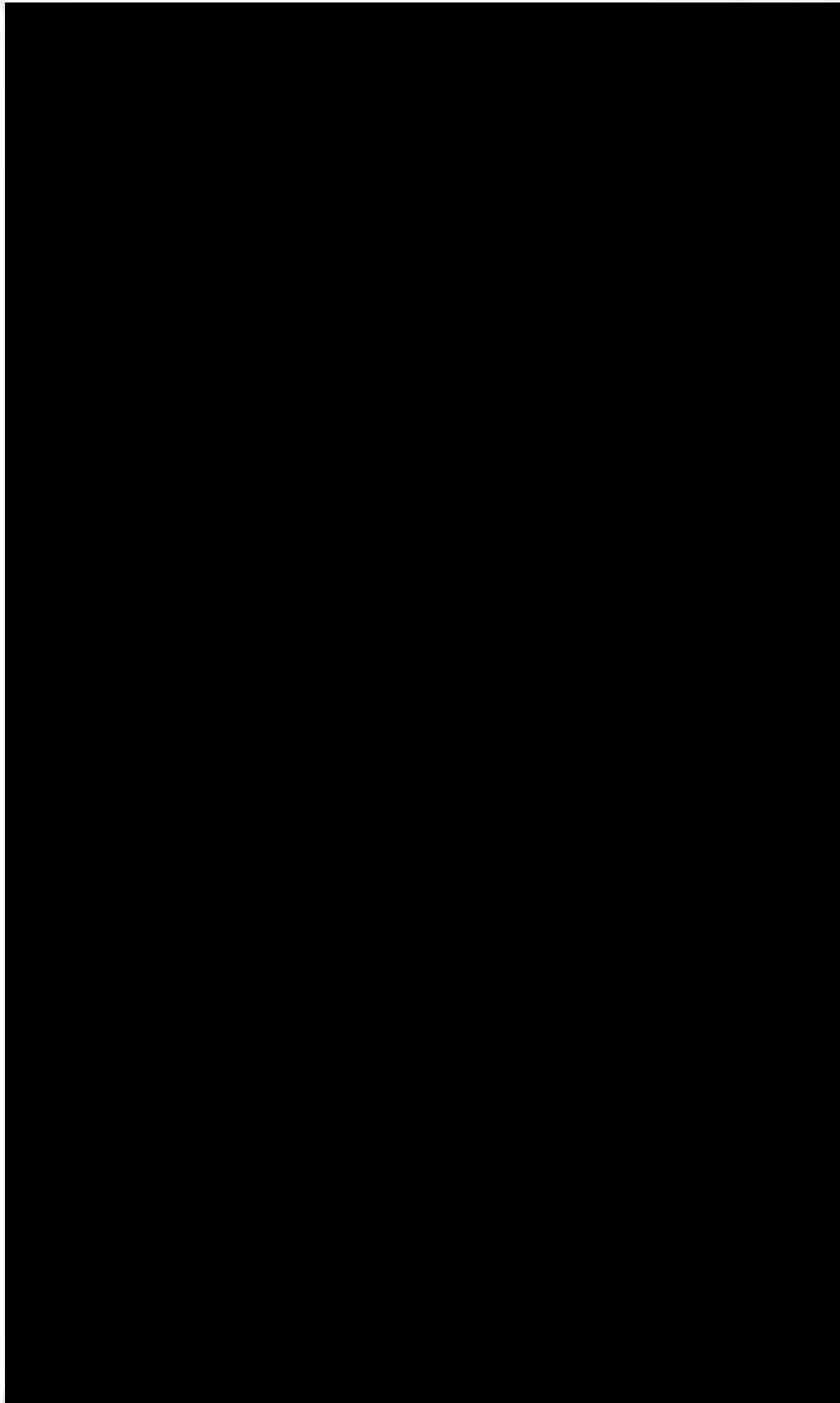
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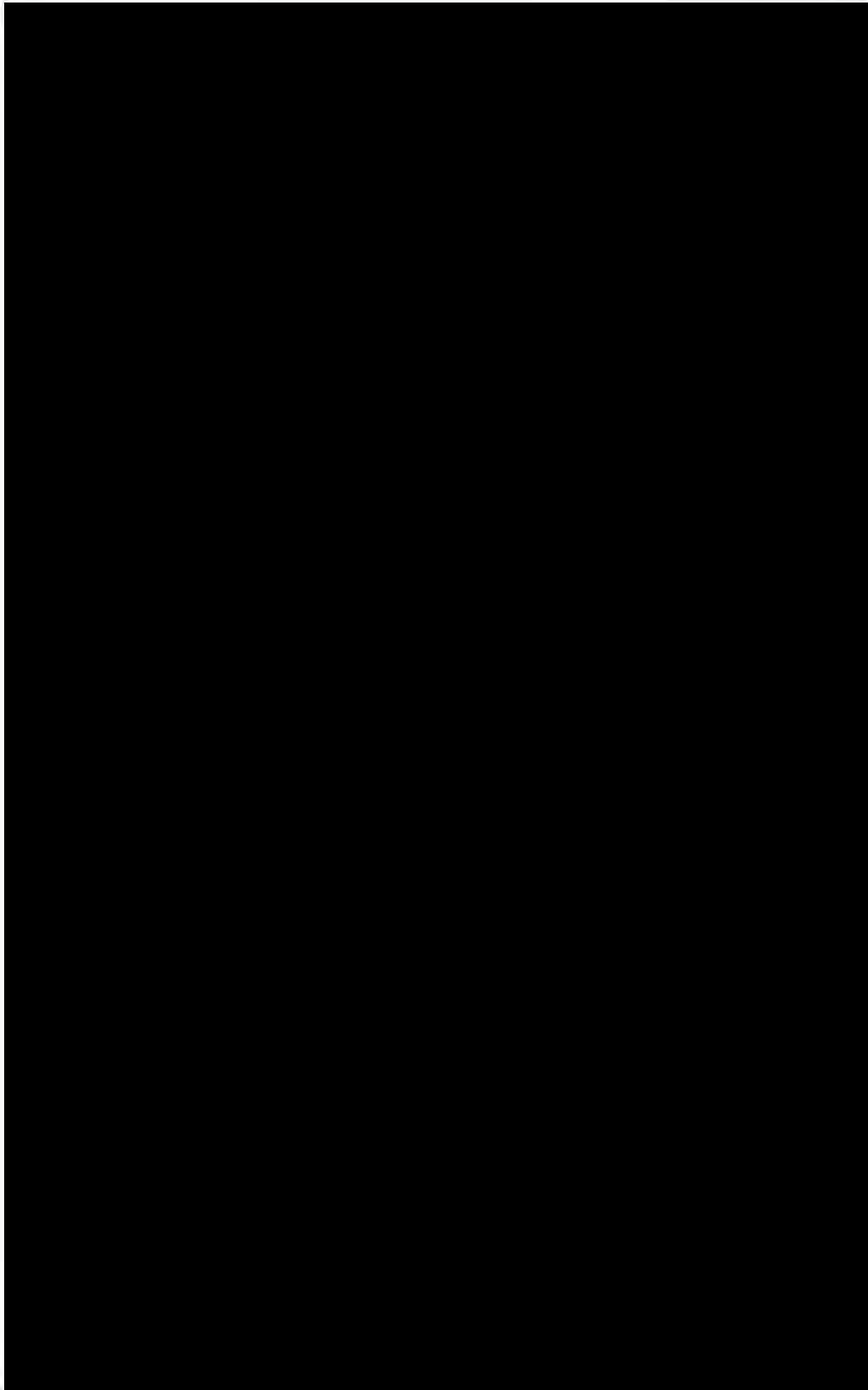
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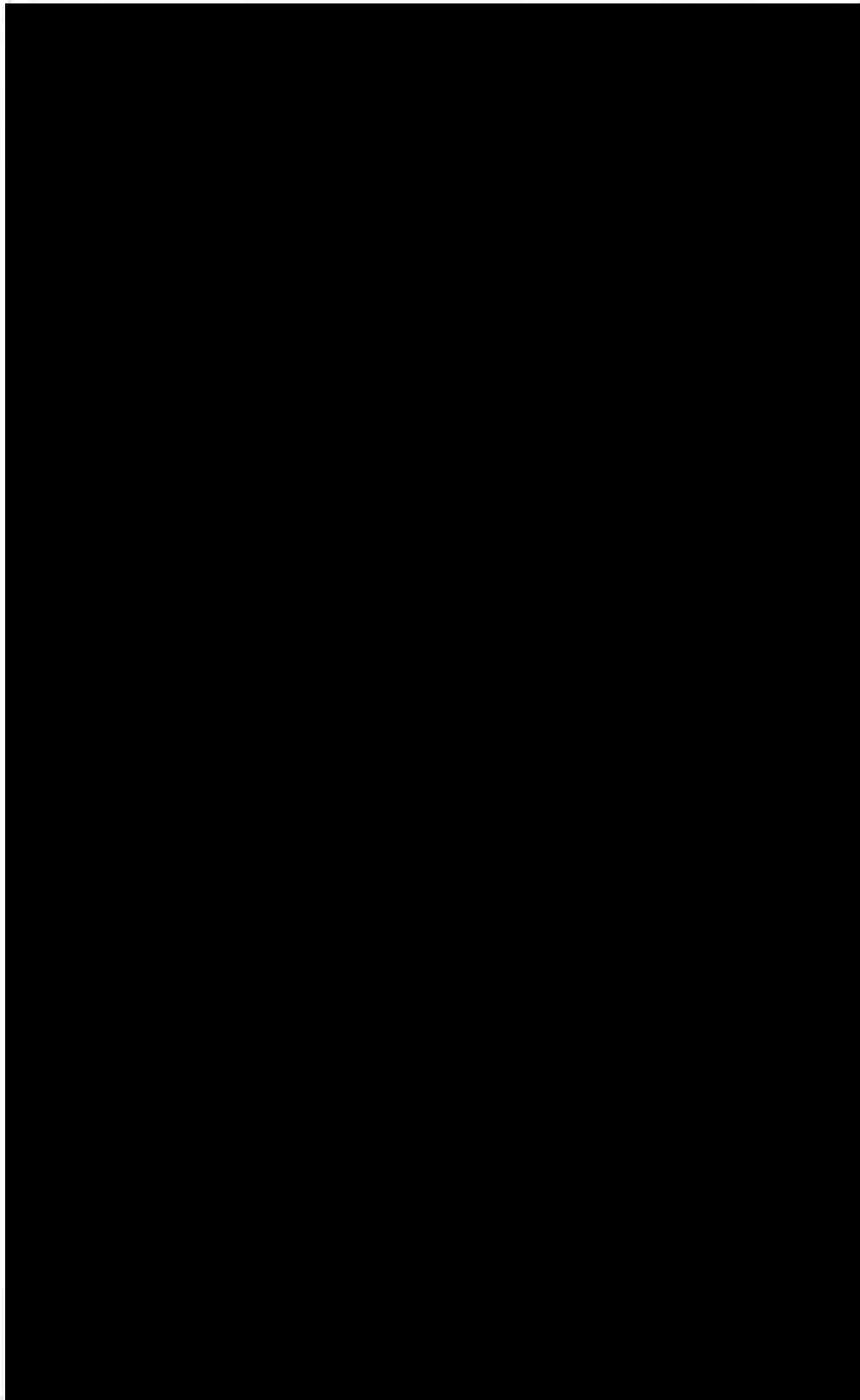
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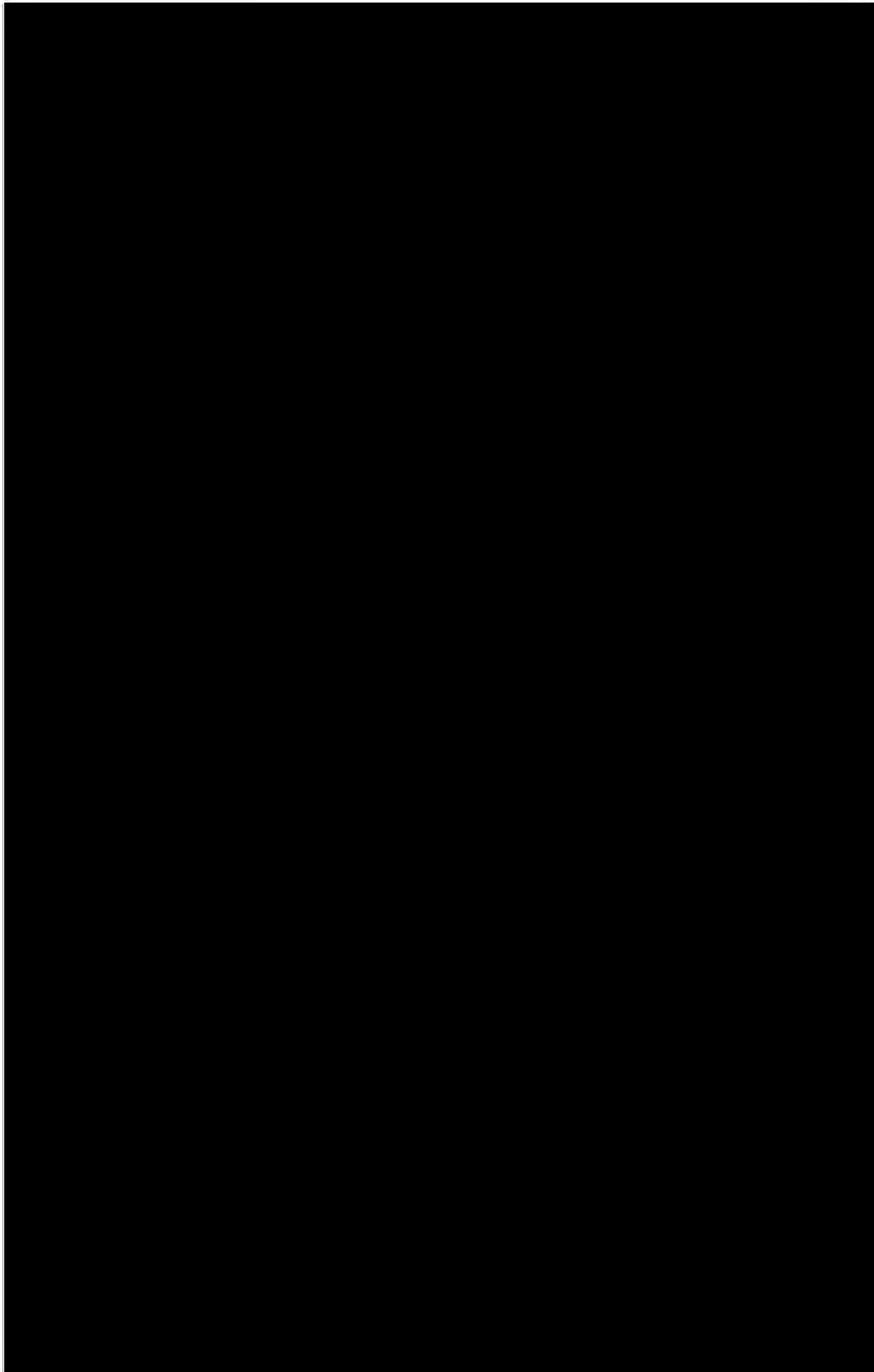


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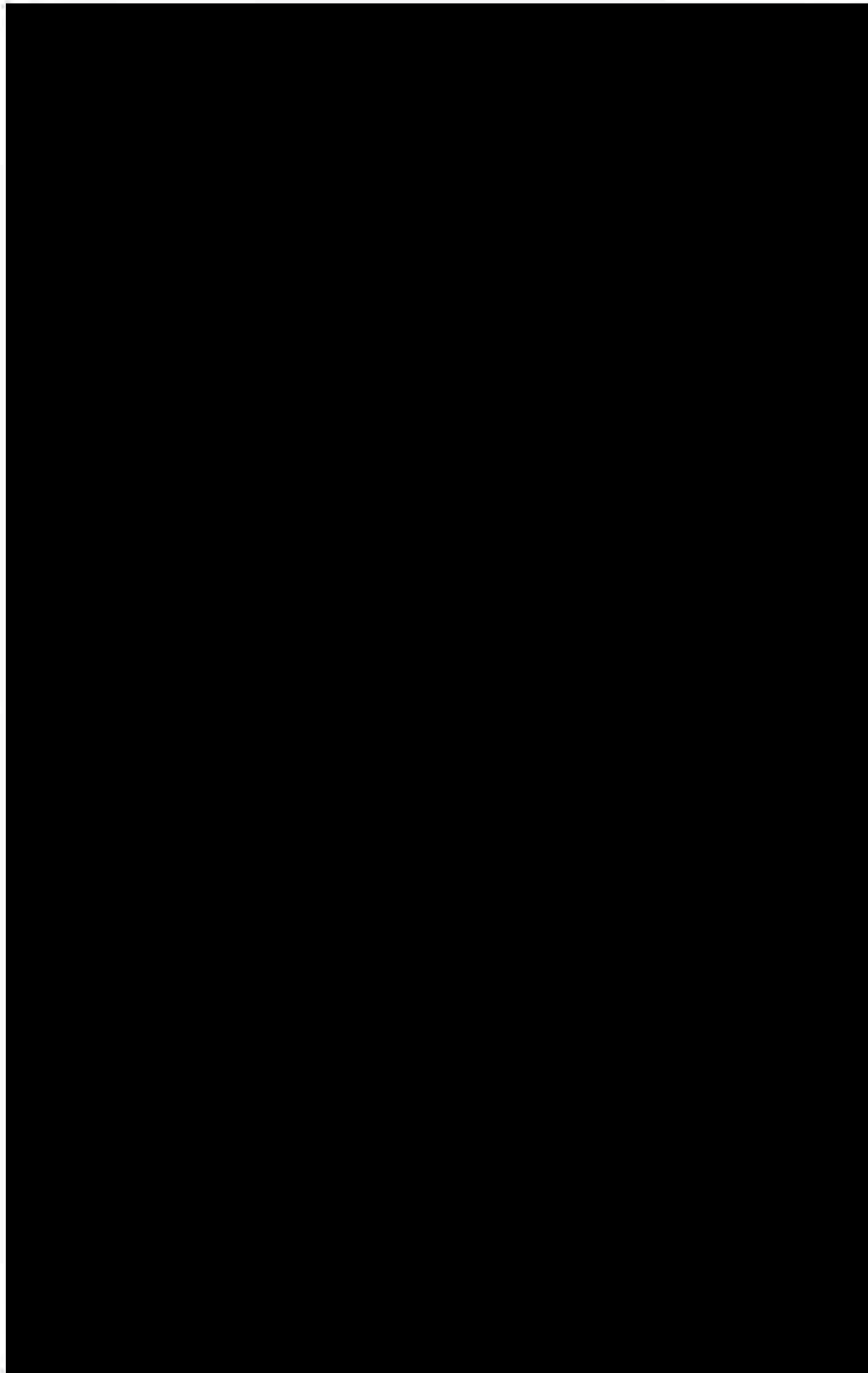


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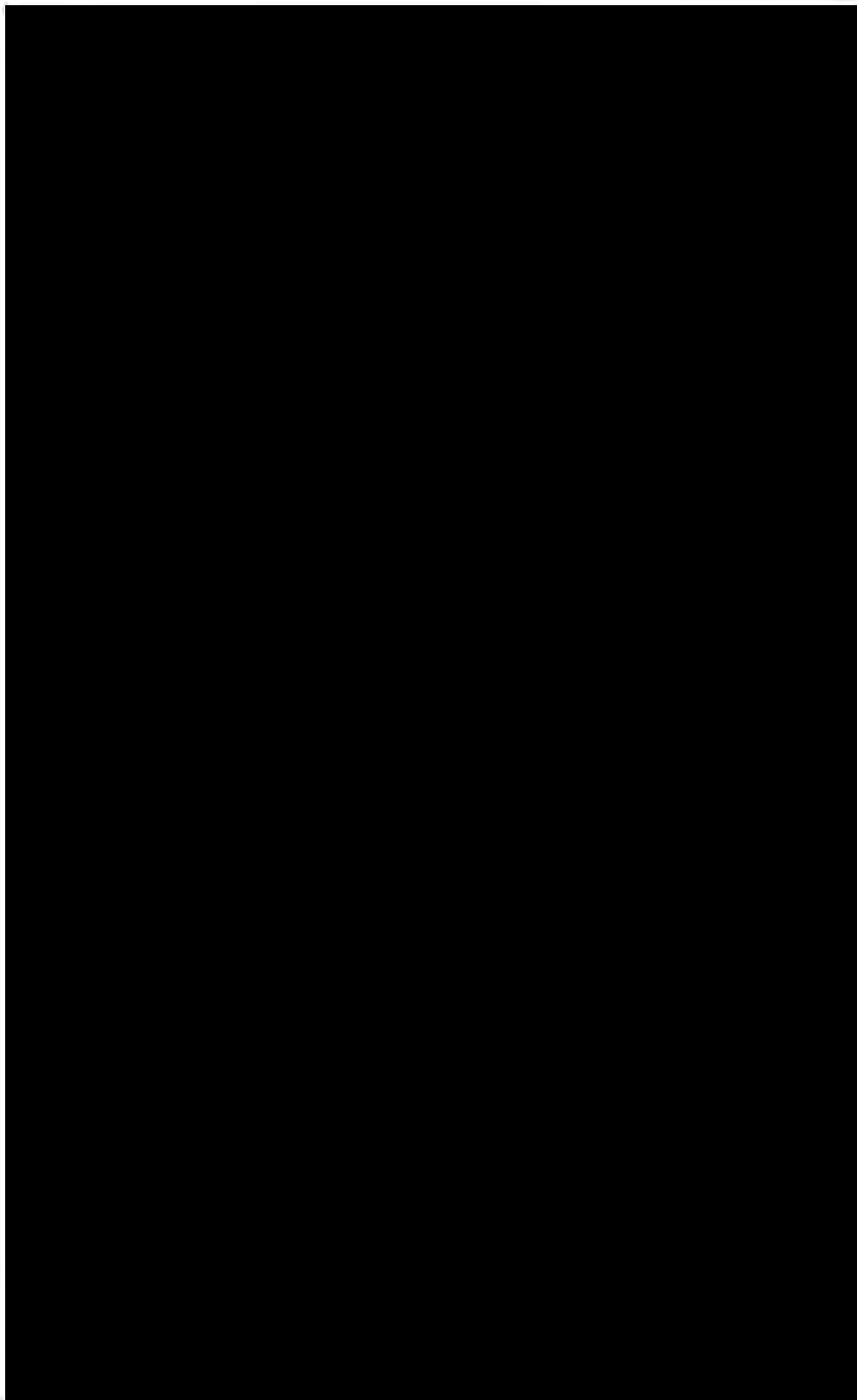
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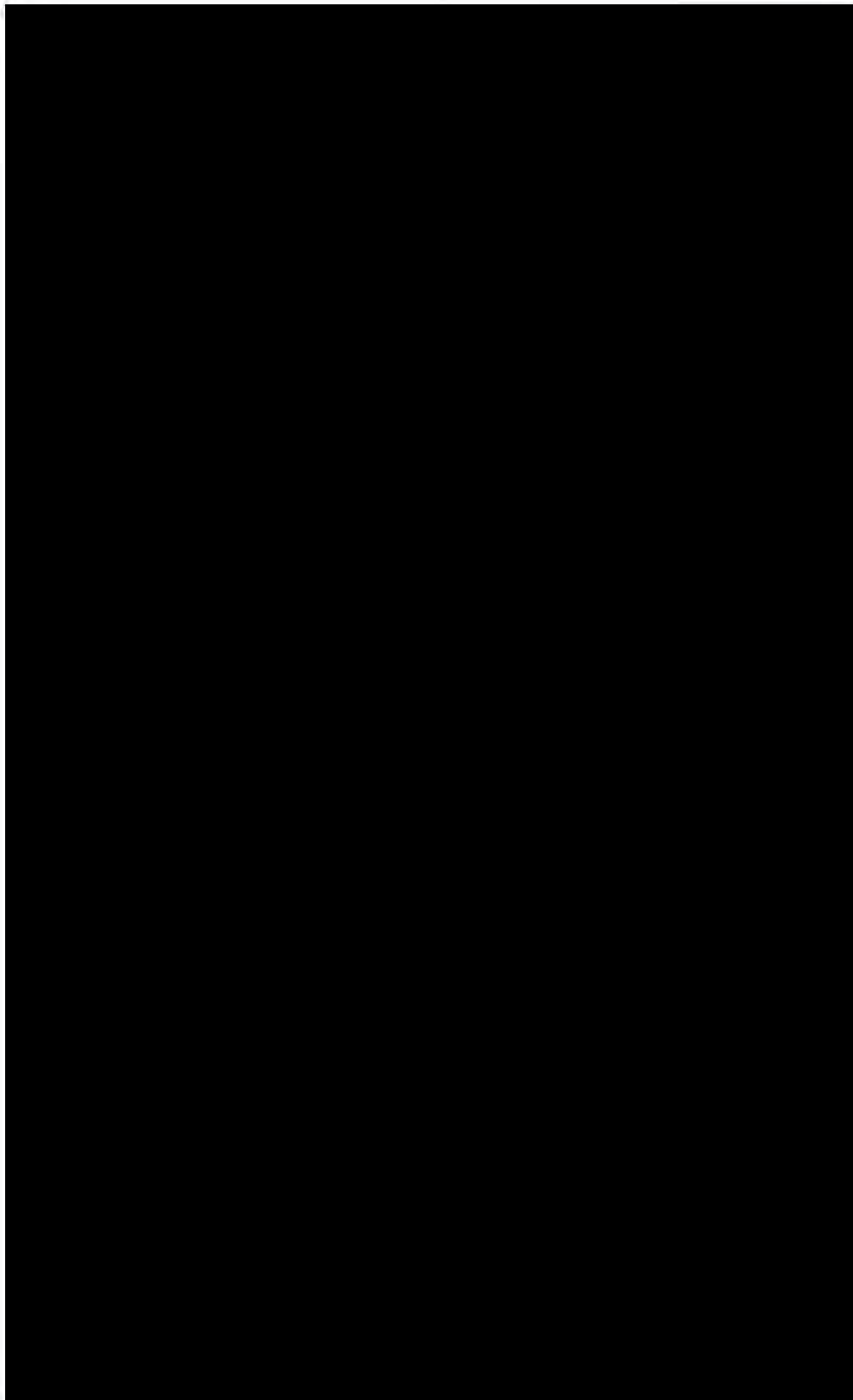
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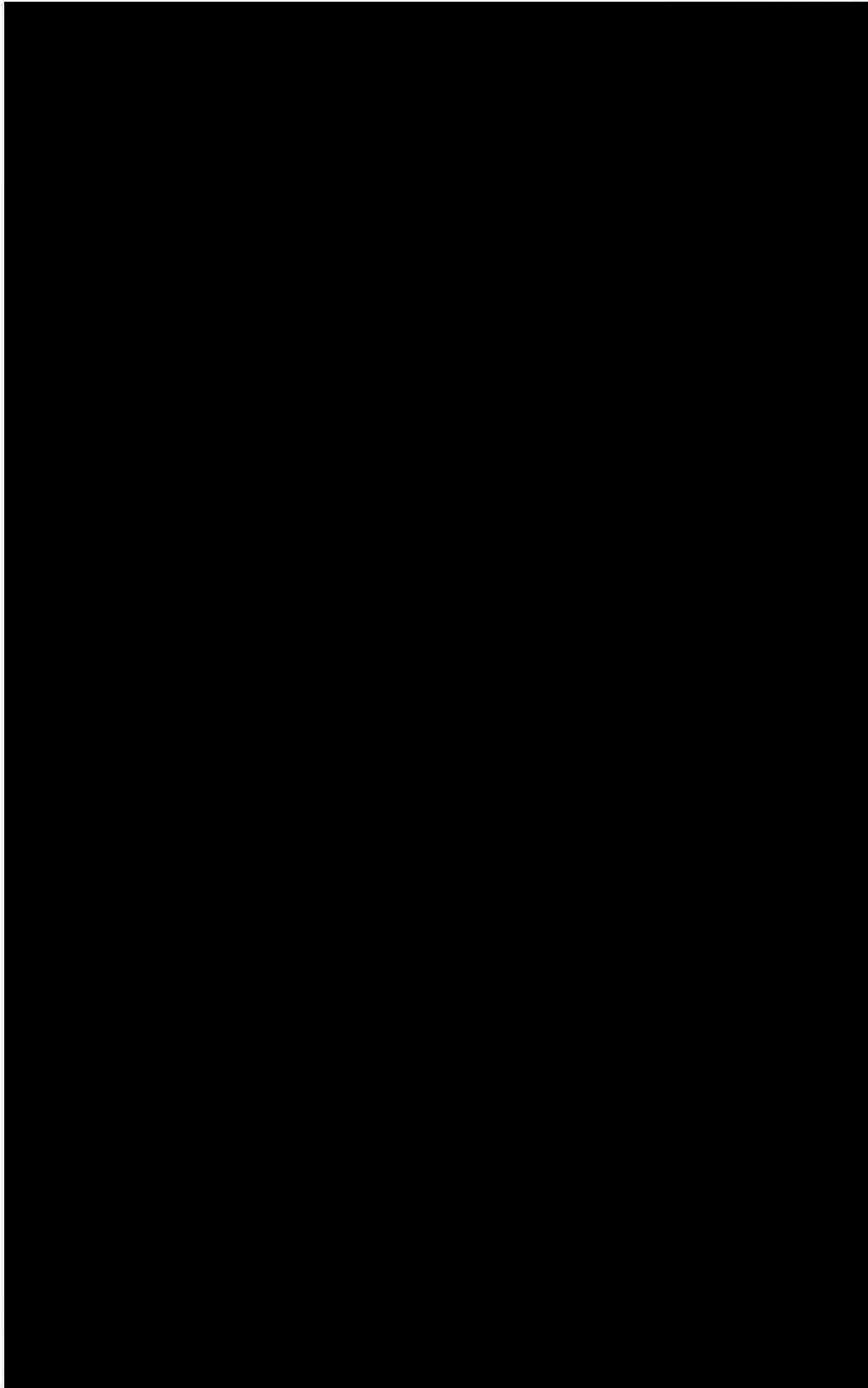
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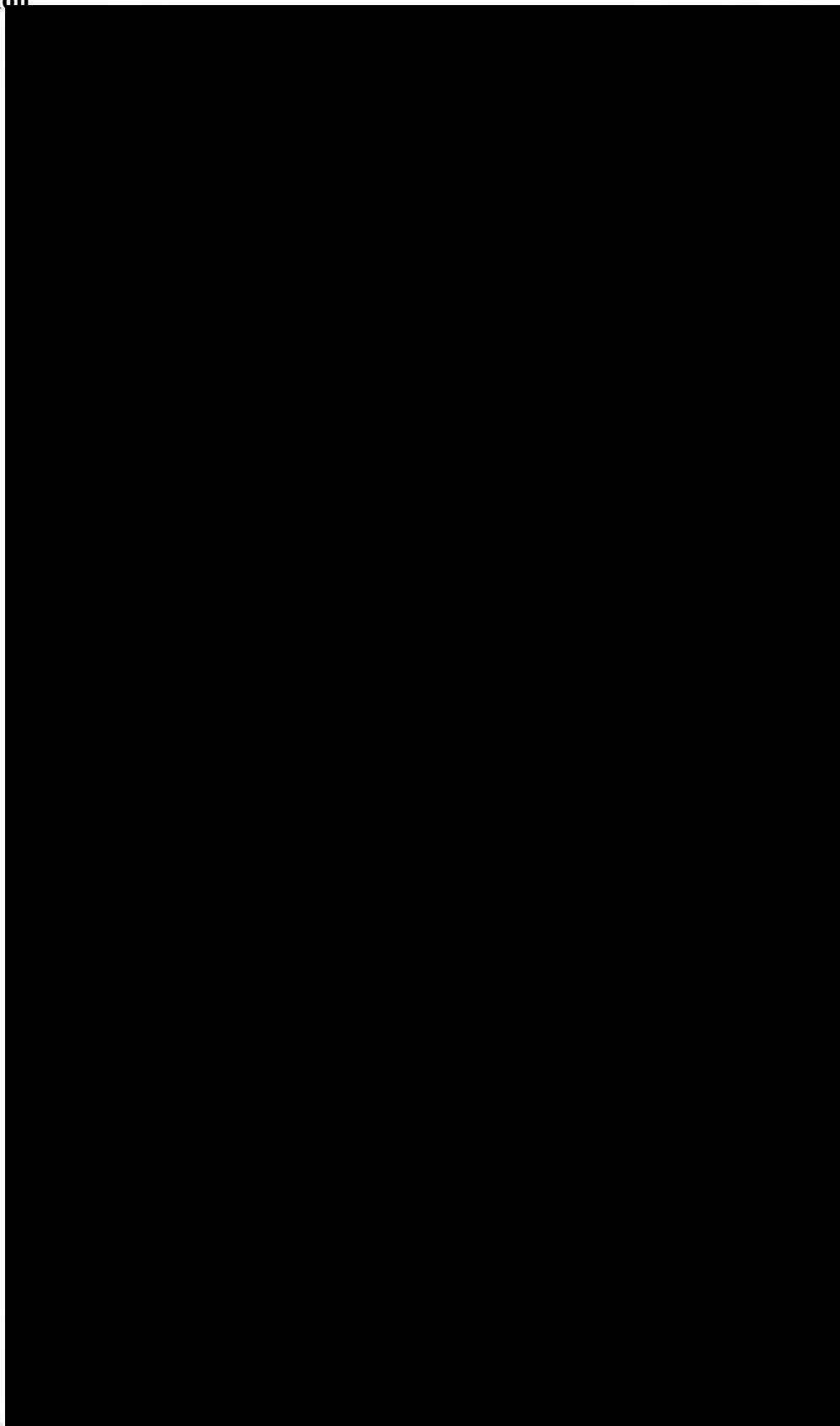
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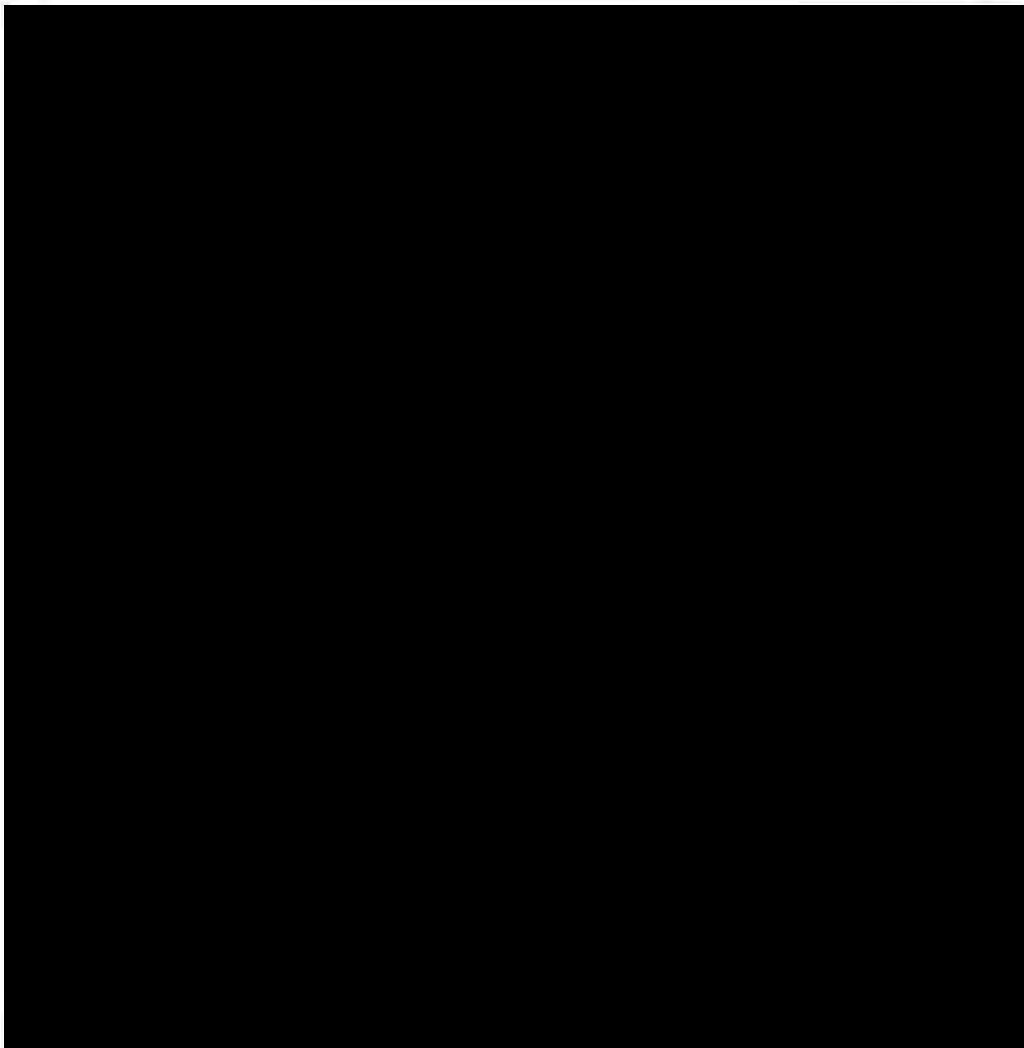
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(Whereupon, the trial resumed in open session.)

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1 O P E N S E S S I O N

2 BY MS. PLOVNICK:

3 Q. Go ahead and finish your answer.

4 A. They are applying a value, based upon
5 their experience as to what things cost as
6 relates to why do I bring this station in to my
7 marketplace. And it will vary depending on
8 what the station is and what is on the station,
9 why they have made the decision to bring it in,
10 and their experience as to the value of sports
11 versus news versus devotional.

12 Q. Experience in the cable network
13 marketplace?

14 A. In the cable television programming
15 acquisition business.

16 Q. So it wouldn't be limited to distant
17 signals in your view; it would also include
18 cable network transactions?

19 A. They are being asked to provide
20 valuation, a percent valuation for the distant
21 signals they bring into their market. And in
22 so doing, they are bringing their experiences
23 in purchasing programming.

24 So, yes, how much we pay ESPN in a
25 marketplace, which is so much more than we pay

1 for other categories of programming, factor in
2 how much they have had to pay in their
3 marketplace if a pro team was added to an RSN,
4 and how that related to their overall
5 programming budget factors into their decision.

6 However, they could be bringing one
7 distant signal in that's a PBS station. And in
8 their mind, 100 percent of the value goes to
9 PBS. I don't know. It is statistics and it is
10 all over the board.

11 Q. And those evaluation factors would be
12 the same if the individual was working in
13 marketing as -- it wouldn't change?

14 A. It is a -- you're bolloxed up in a
15 distinction that doesn't exist. The fact that
16 they have a marketing title or a product title
17 or their title is general manager doesn't mean
18 -- doesn't impact whether or not they are the
19 decisionmaker in that particular marketplace.

20 Q. So they would still be considering
21 cable network values while they were doing
22 this, that they would still have that knowledge
23 and take that into account?

24 A. If they were the local programming
25 decision-person in the marketplace, they have

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1 been working in programming for some period of
2 time. They have been the interface with
3 corporate for programming decisions that relate
4 to their market.

5 So it might be a marketing person. It
6 might be a person that has some type of
7 programming in their title. I have seen that.
8 It might be a product person. There might be
9 some type of intelligence, competitive
10 intelligence.

11 And frequently it is the GM or area
12 manager or the myriad of titles that different
13 cable companies over 30 years have given to the
14 man or woman that was running the system.

15 Q. But my question -- go ahead.

16 JUDGE STRICKLER: May I?

17 MS. PLOVNICK: Go ahead.

18 JUDGE STRICKLER: I want to try to
19 relate what you are saying. I think it relates
20 to the format of Question 4a in the Bortz
21 survey.

22 THE WITNESS: Yes, sir.

23 JUDGE STRICKLER: I don't think it
24 matters whether it is the WGNA-only or not.

25 THE WITNESS: Yeah.

1 JUDGE STRICKLER: But the question
2 begins -- I'm not going to read the whole thing
3 -- but it begins: "Now I would like you to
4 estimate the relative value to your cable
5 system of the programming," and I will stop
6 there.

7 THE WITNESS: Yes, sir.

8 JUDGE STRICKLER: And then at the end
9 of that paragraph the question is asked: "What
10 percentage, if any, of this fixed dollar amount
11 would your system have spent?"

12 Now, if you were answering this
13 question, given your expertise in the business,
14 would relative value mean the relative value
15 after you have paid the costs or it's, as one
16 of counsel's points earlier, was what drops to
17 the bottom line.

18 THE WITNESS: Yeah.

19 JUDGE STRICKLER: And you would rank
20 value according to what drops to the bottom
21 line, or would you rank value based on how much
22 you spent; in other words, if you spent more on
23 sports than anything else, but it left you
24 with, let's be ridiculous, 1 cent --

25 THE WITNESS: Yes.

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1 JUDGE STRICKLER: -- on the bottom
2 line; whereas you spent a much, much smaller
3 amount for Program Suppliers, but it left you
4 with 10 cents on the bottom line, ten times as
5 much.

6 In that situation, which one has the
7 higher relative value?

8 THE WITNESS: Well, you are asking
9 about the specific signals, too. It is tied to
10 the signals.

11 JUDGE STRICKLER: Well, but this
12 question is disaggregating from the signal,
13 right?

14 THE WITNESS: Well, it will -- well,
15 it is still the signals in the totality, I
16 think, right, for the distant signals. So it
17 does aggregate.

18 But I guess to get to your question --
19 and if it was counsel's question, I apologize
20 if I wasn't answering it, it -- I don't think
21 it is for programming expense. It is -- it is
22 what are you valuing of these distant signals
23 that you are bringing in.

24 And it is hard to not factor in an
25 understanding that you have, as an executive in

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1 the industry, what are you spending money on?

2 And I think -- I think -- I think that
3 is how you get to this. It is -- it is how --
4 how -- what is the valuation, market valuation
5 that I'm ascribing to this programming.

6 It is hard not to consider what your
7 programming expense is in looking at that.
8 However, if you are bringing a couple PBS's and
9 a devotional in, that could absolutely skew
10 your responses here.

11 JUDGE STRICKLER: Well, again, I
12 appreciate it, but my question is -- is, I
13 think, more general.

14 THE WITNESS: Yes.

15 JUDGE STRICKLER: Which is if you
16 spend \$10 million to get sports, so that's your
17 cost, that's how much you spent, that would be
18 the answer to -- literal answer to the question
19 towards the bottom of 4a, and it leaves you
20 with one penny on the bottom line, and you
21 spent \$10,000 for Program Suppliers, and it
22 leaves you with 10 cents on the bottom line,
23 which has more relative value?

24 How do you respond to this question,
25 just on my hypothetical?

1 THE WITNESS: It's hard.

2 JUDGE STRICKLER: That I agree with.

3 THE WITNESS: Well, the way I
4 understand the survey, I would -- I would be
5 taking these categories and I would be looking
6 at the distant signals that I brought in,
7 whether it is WGN or some combination, and
8 what percent value I'm ascribing to it.

9 And I would be factoring in, you know,
10 what the marketplace cost was of this
11 programming.

12 And it is interesting that it comes
13 out to about 40 percent. I mean, that's
14 interesting from a real high level since that's
15 about what sports programming is costing.

16 JUDGE STRICKLER: So if I understand
17 your answer correctly, you would be thinking of
18 two different things.

19 You would be thinking of how you would
20 disaggregate the value within the signal that
21 you received, because you have already paid,
22 you have paid an amount of royalties under the
23 various -- whether it is this Syn fund or the
24 basic fund or 3.75, you have already paid and
25 now you are trying to figure out which has

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1 value because you are not worried about cost
2 because the cost is disassociated, if you will,
3 with the value, is that right?

4 THE WITNESS: Yes, and I think that's
5 why you are going to see in some survey results
6 -- I am not a survey expert, I can't go through
7 these and explain them -- but that's why I
8 think on some survey results you might see
9 syndicated series, despite my testimony, you
10 know, Number 1.

11 They -- if they are bringing in a
12 couple distant signals, and one of the distant
13 signals is a MeTV, which is like TV Land, it is
14 a rerun channel, and that might be where they
15 are putting their copyright royalty, those
16 types of expenses.

17 So that might be in their mind why in
18 this system I bring in a distant signal, and
19 when they are answering the survey and that's
20 what's listed.

21 JUDGE STRICKLER: So let me take what
22 I think is the other thing you said would be in
23 your mind if you were answering this question.

24 Let's forget about the
25 distantly-retransmitted signal for a second.

1 Let's talk about a hypothetical marketplace
2 where there is no regulation.

3 I am going to repeat --

4 THE WITNESS: Yes, sir.

5 JUDGE STRICKLER: -- hopefully my
6 hypothetical in the same general way.

7 You have got sports that costs you \$10
8 million, that's what you spend, and it leaves
9 one penny at the bottom line in terms of the
10 estimate of how valuable it is to the cable
11 system.

12 You spent \$10,000 of Program
13 Suppliers. It leaves 10 cents on the bottom
14 line.

15 Which one has a higher relative value?

16 THE WITNESS: That's not the world --
17 that's not the world within which we live. But
18 I think you would see a higher relative value
19 ascribed to sports in that limited scenario.

20 JUDGE STRICKLER: So you would answer
21 that question by saying the higher relative
22 value is based on the amount that was spent,
23 not the amount that drops to the bottom line?

24 THE WITNESS: If it was just -- if it
25 was that, that extreme, that type of extreme

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1 where 99 percent is going to one of the four
2 categories, one of the five categories --

3 JUDGE STRICKLER: Well, that was just
4 to make it vivid. I mean, if that's -- if
5 that's making the question difficult for you, I
6 don't want to keep that, those parameters in
7 the question.

8 THE WITNESS: It is.

9 JUDGE STRICKLER: If sports costs \$10
10 million and it gives you a million dollars to
11 the bottom line, and Program Suppliers cost you
12 \$5 million and it drops \$2 million to the
13 bottom line, which one has a higher relative
14 value?

15 THE WITNESS: I don't know if I would
16 be looking at it the way you are categorizing
17 it. I think I would be falling back on why am
18 I carrying this?

19 I am carrying this because I am going
20 to probably lose customers if I don't have it.

21 It's a small component, for instance,
22 of the programming on WGNA. But why am I
23 carrying WGNA, when I just look at that, I am
24 carrying it because I have to -- I feel like I
25 have to have these sports.

1 So setting aside the amount that I am
2 putting into royalty or whatever the economics
3 are and how that nets out to my bottom line, I
4 am answering the question: What is the
5 relative value?

6 And the relative value -- and I am
7 coming back and saying: Why do I carry this?
8 I carry it because it has MeTV and a syndicated
9 series. I am carrying WGN because it has got a
10 hundred of these games and I feel like I have a
11 lot of Cubs fans or whatever. And I think you
12 then step back and you apply percentages.

13 JUDGE STRICKLER: But my question was
14 to take us out of the retransmission. We're
15 looking at a hypothetical marketplace where
16 there is no regulation for purposes of my
17 question, maybe for purposes of the
18 determination as well, but that's a different
19 question.

20 THE WITNESS: Sure.

21 JUDGE STRICKLER: For purposes of my
22 question, the question is: Do you look at the
23 cost that was paid, imagine you were just
24 picking groups of programs, you were either
25 taking the team sports or you were taking

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1 programs, sports costs much more, but the
2 bottom line is that, that programs gives you a
3 higher profit.

4 Which do you care about in terms of,
5 if you were going to say which has the higher
6 relative value, would you say the higher
7 relative value is the category of programming
8 that costs more or the high -- or the category
9 of programming that adds more to the bottom
10 line, which is, bottom line, to go back to the
11 point you made, is either in terms of voiding
12 the cost of lost subscribers or gaining new
13 subscribers?

14 THE WITNESS: I -- it is hard to
15 separate it out. It is hard to say that I am
16 not looking on a market basis and valuing as to
17 something that is so substantially expensive.

18 However, I am not so much looking at
19 the bottom line as I am looking at my product
20 offering. I want to have Comedy Central on. I
21 want to have W -- I want to have a disparate
22 amount of programming, some of which is not
23 going to be that expensive.

24 JUDGE STRICKLER: Well, I understand
25 that. But you don't want Comedy Central

1 because you love Trevor Miller.

2 THE WITNESS: Right.

3 JUDGE STRICKLER: You don't want
4 Comedy Central because you think it is some
5 aesthetic thing that's good, you may feel that
6 way about it, but you want it because it drops
7 to the bottom line.

8 My question is much more of a
9 shorthand question, which is I have already
10 subsumed that the bottom line is what the
11 bottom line is because you have Comedy Central,
12 but Comedy Central knows that so it demands
13 more money if you want to carry it.

14 So my question already subsumes all of
15 those things that you just said. So, again,
16 when you get to the relative value, do you --
17 would you, in responding to this survey, if you
18 were talking about a hypothetical marketplace,
19 would you, again, would you value sports more
20 because it costs much more than programs, in
21 the Program Supplier category, or would you
22 value Program Suppliers more if it happened to
23 drop more to the bottom line, to the profits of
24 the cable company?

25 THE WITNESS: I would value sports

1 more because it costs more and because, unlike
2 any other category, I will lose customers, I
3 will assuredly lose customers if I don't have
4 it, which is going to totally change the bottom
5 line in the way the marketplace, as reflected
6 in my stock price, values my company.

7 So I would have to value sports more.
8 It costs more. It puts me at the most risk of
9 losing subscribers, which is going to change
10 the whole bottom line calculation, and it is
11 going to change the market cap potentially of
12 my company. So I have to value it more.

13 I am not going to discount and put
14 zeros on other things, which is where I was
15 having trouble with the 99 percent valuation
16 thing.

17 But, yes, I have to value sports more
18 because, as much as it is a punch in the gut
19 cost-wise, it is a punch in the gut cost-wise
20 because I have to have it on, and I am
21 retaining my customers by having it on.

22 JUDGE STRICKLER: Thank you.

23 BY MS. PLOVNICK:

24 Q. So I have to confess I don't remember
25 what we were talking about before.

1 (Laughter.)

2 A. I think Mr. Cantor was in that place a
3 couple times, too.

4 Q. So I will just move to something new.

5 A. Thank you.

6 Q. So, Mr. Singer, so I wanted to ask you
7 a few questions about your rebuttal testimony.
8 And one of the witnesses that you responded to
9 was Ms. Sue Hamilton; is that correct?

10 A. Yes.

11 Q. Do you know Sue Hamilton?

12 A. Yes, I know her.

13 Q. Do you both live in Denver?

14 A. We're very close friends.

15 Q. Very close friends. You both worked
16 at Charter?

17 A. Yeah. Sue worked at Charter -- we
18 worked at Charter at separate times.

19 Q. Separate times, but you both held
20 similar positions at Charter at different
21 times?

22 A. Yes, and we worked at the same company
23 and Sue worked for me for a short period of
24 time.

25 Q. All right. So in your rebuttal

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1 testimony you criticize Ms. Hamilton's
2 testimony regarding legacy carriage and also
3 you have said some things about WGNA as well.

4 A. Yeah.

5 Q. And I believe also about program
6 categories. So let's just start -- I will
7 start with WGNA.

8 So at the time that you worked at
9 Charter, which was 2011 through 2016, did the
10 cable systems that you were responsible for,
11 did they all carry WGNA?

12 A. No.

13 Q. Did most of them carry WGNA?

14 A. Yes.

15 Q. And during the time period from 2010
16 to 2013, there was a sports programming on
17 WGNA; is that correct?

18 A. Yes.

19 Q. Now, WGNA converted to become a cable
20 network in 2015; is that right?

21 A. Yes.

22 Q. And they discontinued sports carriage?

23 A. Yes.

24 Q. So did your systems continue carrying
25 WGNA after the sports went away?

1 A. Not only did we continue to carry it,
2 we rolled it out to the whole company.

3 Q. You rolled it out to the whole
4 company?

5 A. Yes.

6 Q. As a cable network?

7 A. As a cable network.

8 Q. Notwithstanding that there was no
9 sports?

10 A. Notwithstanding that there was no
11 sports.

12 Q. There is also no news?

13 A. Yes.

14 Q. Yes.

15 A. That is all true.

16 Q. So the -- so what programming was on
17 WGN then?

18 A. It didn't really matter because
19 Tribune at that point in time was telling us
20 that we had to carry --

21 Q. You had to carry --

22 A. -- we had to carry WGNA, which they
23 had never said before, as reflected in the
24 carriage prior to them dropping that bomb on
25 us.

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1 Q. But it had syndicated series on it; is
2 that correct?

3 A. Had syndicated series on it.

4 Q. Had movies on it?

5 A. I guess. It wasn't really that
6 important.

7 Q. It wasn't important to you?

8 A. No, we really -- we needed to carry
9 the Tribune broadcast stations. And
10 conditioned on carrying the Tribune broadcast
11 stations, we needed to carry WGN, even though
12 the value had been removed from WGN by removing
13 the sports.

14 And as consideration for that, we paid
15 less overall for the Tribune broadcast
16 retransmission consent than we otherwise would
17 have in the pure marketplace agreement.

18 JUDGE FEDER: Did you even have to
19 carry it in markets where you weren't importing
20 Tribune signals?

21 THE WITNESS: Yes. We rolled it out
22 -- we had to roll it out to the rest of the
23 company. So when I talked about -- so it went
24 on in Tribune markets, but also went in where
25 we weren't carrying it in the non-Tribune

1 station markets. And it went in at a fixed
2 cost that was tagged to what we would have been
3 paying with copyright and license fees.

4 So it stayed static. We rolled it
5 out. But we paid less than we had just paid
6 Tribune for the broadcast stations what we
7 otherwise might have. That was the
8 consideration.

9 BY MS. PLOVNICK:

10 Q. Why did you make that deal?

11 A. Because we paid less money than we
12 otherwise would have.

13 Q. You paid less money than you would
14 have under the statutory license?

15 A. No, I paid less money than I otherwise
16 would have to Tribune if we had just dropped W
17 -- WGN, they said we're shutting it down, and I
18 want the same deal that Sinclair and Gannett
19 gets, I would have been paying overall more
20 money to Tribune than I was by doing these
21 things for Tribune and giving them a huge rate
22 increase.

23 JUDGE FEDER: Overall money for
24 retransmission consent?

25 THE WITNESS: Yeah. Exactly. It went

1 up by like 300 percent.

2 BY MS. PLOVNICK:

3 Q. But W had been carried for a long time
4 prior to this, correct, right, in your Charter
5 systems?

6 A. But it no longer had any value. It
7 didn't have sports. Like you said, it had a
8 bunch of reruns and movies.

9 Oh, they were also coming out with a
10 slate of originals like Salem, that didn't --
11 that I don't think they were on 12 months
12 later.

13 Q. But you -- so it is your testimony
14 then that there are some things that you carry
15 that have no value to you at all, some
16 networks, cable networks that you carry, that
17 you carry them even though they really have no
18 value?

19 A. There are networks that we carry --

20 Q. Cable networks?

21 A. -- as part of -- cable networks, thank
22 you -- that we carry as part of an overall
23 broad -- overall value proposition with large
24 media companies.

25 So when the field leader sees that NBC

1 is up and says, hey, we can drop Chiller in
2 this market. We can't drop Chiller because
3 that is going to be part of the overall
4 NBCUniversal deal.

5 Q. Didn't you testify earlier that when
6 you were making these sorts of deals that you
7 still ascribed separate values to every single
8 one of the different kinds of cable networks
9 that were carried within the bundle?

10 A. Yes.

11 Q. So none of them had a zero?

12 A. They did have a zero. We ascribed the
13 value because there was an allocated license
14 fee of 14 cents or whatever we were paying for
15 it.

16 Q. So you still ascribed a value on paper
17 even though you didn't have a value in your
18 mind; is that right?

19 A. Even though I would have preferred to
20 drop it. But if ESPN is going to say to me I
21 will give you the same rates that I am giving
22 Comcast, DirectTV, all the other guys, and I
23 will put it in writing, give you written
24 protection, but I really need you to launch --

25 JUDGE STRICKLER: The Ocho?

1 (Laughter.)

2 THE WITNESS: The Ocho, the Ocho, if
3 it had sports, it has value.

4 No, you know, okay, you have to launch
5 -- it was a partnership of the innovation, it
6 was a real lousy channel, and we had to launch
7 it, and it was part of the value equation. It
8 was part of, like the Judge said, it's just a
9 bunch of money after a while.

10 But whenever I am looking at my
11 overall costs that I budgeted for my renewal,
12 and what I am paying and I know that I am
13 paying for the ESPN services and ABC broadcast,
14 yeah, I will pay 14 cents as part of that
15 for -- not Freeform, something else. I can't
16 even remember what it is called any more.
17 It's, I guess, an unfortunate part of life.

18 BY MS. PLOVNICK:

19 Q. The bottom line is you didn't drop it?

20 A. The bottom line is I wasn't able to
21 drop it. The bottom line is, one of the
22 reasons why it is interesting here, is that you
23 made determinations as to distant signals, did
24 it have value, can we drop it, because
25 80 percent of our expense went to the top 12

1 media companies, and they were generally able
2 to legally bundle everything together.

3 So you didn't have that much of an
4 opportunity to drop things.

5 Q. Did you carry additional distant
6 signals in place of WGNA?

7 A. No, there was no 100-pack sports
8 package of additional.

9 Q. So your testimony is that even
10 notwithstanding the fact that WGNA converted to
11 a cable network, that you did not import other
12 distant signals in its place?

13 A. My testimony is I don't recall that,
14 when WGNA became a cable network, that we
15 replaced it with another distant signal.

16 Q. You don't recall? Okay.

17 All right. So you also disagree with
18 Ms. Hamilton about the Bortz survey category
19 descriptions. And she said that they would be
20 -- she thought they would be unclear. You
21 disagreed with that?

22 A. They are not unclear.

23 Q. You don't believe they are unclear.
24 But you also testified that you were never a
25 Bortz survey respondent, correct?

1 A. I did testify to that.

2 Q. So you never had to be put in the
3 position to determine whether or not they were
4 clear or not clear?

5 A. I was never put in the position, but I
6 have looked at it. They are not unclear.

7 Q. And you don't even think you would be
8 the person authorized to make such a
9 determination, or empowered to; you said other
10 folks would be the ones having to make that
11 decision?

12 A. With respect to the question about
13 distant signals, it would be better to ask the
14 field leaders that the Bortz survey asked.

15 Q. You don't really know whether they
16 were clear or unclear to those individuals? I
17 mean --

18 A. Within the nomenclature of the
19 industry, they are absolutely clear categories.

20 Q. In your opinion as a top executive?

21 A. In my opinion as a top executive.

22 Q. All right. So you also disagreed with
23 Ms. Hamilton about the importance of viewing to
24 a CSO decision-making. But then when you
25 testified here earlier in response to some

1 questions you said that you thought viewing was
2 important and a component of that
3 decision-making.

4 So you would agree that viewing is
5 important to cable operators?

6 A. I would -- I would agree that viewing
7 is an important component in evaluating cable
8 networks. I don't believe viewing as solely
9 ascribed by Nielsen is necessarily an important
10 component. It can be, but it not necessarily
11 is. And there certainly isn't a one-to-one
12 correlation, no matter how you want to value
13 things.

14 Q. But there is a correlation? That was
15 your testimony earlier.

16 A. There can be a correlation, if there
17 is a popular, must-have series, Game of
18 Thrones, that's going to correlate.

19 Something like 30 Rock on WGN, which
20 can get a rating, has no value, very little
21 value. It has value in that it is making
22 advertising revenue for WGNA and that reduces
23 the pressure on license fees, but that's about
24 the extent of the value.

25 Q. But that's value?

1 A. That's value. The fact that it's
2 supporting an advertising model is absolutely
3 value.

4 Q. So in order to retain subscribers,
5 wouldn't you agree it is important for a CSO to
6 offer programming that the subscribers want to
7 watch?

8 A. In a general matter, but if they want
9 to watch the programming and it is
10 undifferentiated, it is available in many
11 platforms, including outside of the
12 subscription television universe, and free
13 broadcast television or subscription service.
14 It is not something that we really need for
15 retentive purposes.

16 Q. So you don't think that cable
17 subscribers subscribe because they want to
18 watch television?

19 A. That's not what I said, is it?

20 Q. So tell me what you said.

21 A. I said that it can be important. But
22 the simple matter that somebody might want to
23 watch something is not determinative as to
24 whether or not it has value for retentive
25 purposes, if it is something that is available

1 in many platforms, is homogenous and it's
2 undifferentiated, sort of like reruns in old
3 movies.

4 Q. Was sports available on many platforms
5 in 2010 through 2013?

6 A. Sports is available -- team sports are
7 available on many platforms. But the
8 particular team sport, the event, is almost
9 always exclusively on one channel. And when it
10 is not, it is a real -- it is a small carveout.

11 But it is basically only available on
12 one channel.

13 Q. All right.

14 JUDGE STRICKLER: When a show that is
15 on WGN, 30 Rock, for example, is on at a
16 particular time, say 8:30 p.m. on a Tuesday
17 evening, is there any reason to believe that it
18 is available at 8:30 p.m. on a Tuesday evening
19 on any of the other competitive systems?

20 THE WITNESS: It probably isn't, it
21 probably isn't, although it would be available
22 whenever you want on Netflix and on on-demand.
23 And that's one of the things that, you know,
24 Mr. Mansell didn't note, that this change, this
25 technological change that is going on here,

1 really impacts Program Suppliers content more
2 than anybody.

3 JUDGE STRICKLER: The Netflix
4 phenomenon that you just mentioned, did that
5 exist during the period 2010 to 2013?

6 THE WITNESS: Right, and on-demand --

7 JUDGE STRICKLER: Yes or no.

8 THE WITNESS: Yes.

9 JUDGE STRICKLER: Thank you.

10 THE WITNESS: And on-demand,
11 availability of on-demand, and recording. So
12 you can just record Big Bang Theory and add the
13 whole library, if that's what you want to do.

14 JUDGE STRICKLER: If people were doing
15 that to a predominant degree, would the shows
16 even continue to appear on any distribution
17 network?

18 THE WITNESS: That's the question, but
19 the --

20 JUDGE STICKLER: And the answer would
21 be?

22 THE WITNESS: We will see.

23 JUDGE STRICKLER: Thank you.

24 BY MS. PLOVNICK:

25 Q. Another Programs Suppliers witness

1 that you disagreed with was Howard Horowitz in
2 your rebuttal testimony.

3 A. Yes.

4 Q. And you said you disagreed with the
5 decision to add a non-team sports category to
6 the Horowitz survey.

7 A. Yes.

8 Q. And in your testimony you cited some
9 information about non-team sports programming
10 on WGNA as the reason for your disagreement
11 with Mr. Horowitz.

12 Do you recall that?

13 A. That was one of the reasons.

14 Q. Well, so did you examine the volume of
15 non-team sports programming on other signals,
16 other than WGNA, in reaching your conclusions?

17 A. Yes, in that -- well, examine, yes, in
18 that other team sports programming would
19 generally be on the other big three networks
20 besides Fox.

21 So golf, tennis, horse racing, most
22 types would be on CBS, ABC, and NBC, which I
23 don't believe are part of the subject matter
24 here.

25 Q. No, they are not. Did you -- but you

1 didn't do any analysis --

2 A. Can I finish?

3 Q. Go ahead.

4 A. Well, I don't need to analyze that. I
5 know that.

6 Second -- I apologize. I didn't mean
7 to sound that way.

8 Second, when we're looking at the
9 individual channels that are on, I never had
10 anyone come back to me, the non-big fours,
11 broadcast groups, no one ever came back to me
12 and said there is a horse race that we need, we
13 bring this system, this channel in from
14 Minnesota because there is a horse race or
15 there is a lacrosse game or a soccer match.

16 Q. But you didn't do any kind of analysis
17 to determine the volume of non-team sports
18 programming on signals other than WGNA; you are
19 basing these opinions not on analysis but just
20 on your knowledge?

21 A. I think my knowledge is -- is pretty
22 good.

23 Q. But it is not an analysis or any kind
24 of quantification?

25 A. What's analysis or quantification?

Public Version

1 Q. You did not examine any data regarding
2 the volume of non-team sports programming?

3 A. No, I did not. But I do know that the
4 decision to continue to carry a distant signal
5 would not be based on whether there was horse
6 racing.

7 Q. But that wasn't my question.

8 A. That's the answer. That's the
9 ultimate answer to the question as to why Mr.
10 Horowitz's adding these categories is only
11 confusing and has nothing to do with valuation,
12 if you are looking at team sports, if you are
13 looking at the category of sports.

14 JUDGE STRICKLER: With regard to
15 non-team sports, would you identify
16 professional wrestling as a non-team sport?

17 THE WITNESS: No, it is reality
18 programming. It is scripted. It is scripted
19 television.

20 (Laughter.)

21 JUDGE STRICKLER: Is it really?

22 (Laughter.)

23 JUDGE FEDER: You are shocked?

24 JUDGE STRICKLER: You realize that you
25 are under oath, don't you?

1 (Laughter.)

2 THE WITNESS: Unfortunately the door
3 was open, too.

4 JUDGE STRICKLER: Well, an interesting
5 question, I suppose, would be whether it
6 doesn't matter whether you or I, this audience
7 believes that it is a sport; the question is do
8 the people who watch it believe it's a sport.

9 But that's just as an aside. Is
10 professional wrestling broadcast on any of
11 these distantly-retransmitted stations?

12 THE WITNESS: Not that I'm aware.

13 JUDGE STRICKLER: It's all on cable
14 now?

15 THE WITNESS: Yes, it is all on cable.

16 JUDGE STRICKLER: Okay. Was it all on
17 cable back in 2010 to 2013?

18 THE WITNESS: Yes.

19 JUDGE STRICKLER: Okay. Thank you.

20 JUDGE FEDER: How about things like
21 NASCAR, golf?

22 THE WITNESS: So golf, golf would have
23 been on NBC and cable networks, like The
24 Masters.

25 NASCAR is an example of something that

1 falls through the cracks because NASCAR was on
2 Fox. So there was some amount of NASCAR games
3 that would have been on distantly-broadcast
4 signals that aren't included in team sports.

5 I would say the team sports, in the
6 industry team sports as described in the survey
7 are what's compensable. But NASCAR does have
8 value. And I can't speak to that, but that's a
9 whole -- that is a whole -- the NASCAR races
10 that were on Fox, I think in the overall scheme
11 of things, I haven't done an analysis, it would
12 be small.

13 BY MS. PLOVNICK:

14 Q. But you have not attempted to quantify
15 the volume of NASCAR programming --

16 A. No, I have not.

17 Q. -- on distant signals?

18 A. Yes, I have not.

19 Q. So another -- we talked a little bit
20 about this already, but another Program
21 Suppliers witness you disagreed with was Mr.
22 Mansell, correct, and he -- but you do agree
23 with Mr. Mansell that there has been sports
24 migration over time from broadcast to cable?

25 A. Yes.

1 Q. Now, in part of your rebuttal
2 testimony disagreeing with Mr. Mansell, you --
3 actually on page 9 of your rebuttal
4 testimony -- you cited some analysis, as a
5 basis for your opinion, some tables that
6 appeared in Dr. Israel's testimony.

7 Do you remember that?

8 A. Yes.

9 Q. So did you review any of the
10 information Dr. Israel relied on for his
11 conclusions, the underlying data he used?

12 A. No.

13 Q. And are you aware that the numbers
14 that Dr. Israel used are for subscribers or the
15 volume numbers are weighted by distant
16 subscribers?

17 A. What paragraph?

18 Q. I'm sorry, it should be on page --

19 A. I don't have it in front of me,
20 counsel.

21 Q. Yeah, yeah, I think it's down here at
22 the bottom. You are citing different -- in
23 your footnotes, you say: Written rebuttal
24 testimony of Mark Israel, Ph.D., at pages 17
25 through 18, and Table 4.

1 So I assume you must have reviewed
2 that since you are citing Table 4.

3 A. Is that footnote 13 or 14?

4 Q. I am looking at 13.

5 A. Can we scroll -- I can't see 13.

6 Q. Can you blow that up, please, Dima?

7 A. Can you just scroll down so I can see?

8 Q. Yes, page 9, footnote 13.

9 A. I see footnote 13. Can I see where
10 footnote 13 --

11 Q. Where it came from?

12 A. Yes. Thank you. Data on the
13 compensable --

14 Q. So I am asking you about this because
15 it is in your written rebuttal testimony and it
16 is a source.

17 A. Yes, I am relying upon Dr. Israel's --

18 Q. You are relying on Dr. Israel's
19 analysis and his table?

20 A. For that sentence, yes.

21 Q. Did you examine any of the data that
22 he looked at?

23 A. No.

24 Q. And do you know what he used for
25 weighting when he said weighted by subscribers?

Public Version

1 A. I don't.

2 Q. All right. You don't know how the
3 weighting was done?

4 A. No.

5 Q. All right. So you just relied on
6 Dr. Israel for this information?

7 A. Yes.

8 Q. All right. So moving on, you had a
9 lot of disagreement with our witnesses.

10 Another witness that you disagreed
11 with was, of our witnesses, was Mr. Pasquale
12 who worked at HBO.

13 A. Yeah.

14 Q. And Mr. Pasquale testified that
15 viewing information was important to HBO in
16 making programming decisions while he was
17 working at HBO.

18 Is that a correct summation of Mr.
19 Pasquale's testimony?

20 A. That sounds pretty accurate.

21 Q. Were you ever employed by HBO, Mr.
22 Singer?

23 A. No.

24 Q. So were you involved in programming
25 decisions on behalf of HBO?

1 A. No.

2 Q. So you don't really have personal
3 knowledge of what HBO considered in those
4 transactions from the perspective of HBO?

5 A. Well, but what is he talking about?
6 He is -- HBO is buying -- creating original
7 programming. And what viewership data is he
8 looking at to create original programming?
9 Expensive, top tier, fabulous original
10 programming.

11 What's the viewership data that he is
12 looking at when they are purchasing and
13 green-lighting an original series, which can be
14 hits and can be big, big misses? So I didn't
15 really understand what he was talking about in
16 the first place.

17 Secondly, what does it have to do
18 here? I mean, what does it possibly have to do
19 here? That made no sense to me. That was my
20 issues with Mr. Pasquale.

21 Q. But you are not speaking from any
22 perspective of having worked at HBO or having
23 knowledge of what HBO did or did not consider
24 in its decision making?

25 A. That's true.

1 Q. All right. And another witness you
2 disagreed with, and the last one I am going to
3 talk with you about, is Dr. Steckel.

4 And this is, again, about Dr. Steckel
5 said that the questions in the Bortz survey
6 would be unfamiliar and the exercise would be
7 difficult for CSOs.

8 Is that a fair characterization of his
9 testimony?

10 A. Yes.

11 Q. And you disagree with Dr. Steckel?

12 A. Yes.

13 Q. But we have already discussed here
14 today that you were not a Bortz survey
15 respondent yourself, correct?

16 A. I was not a Bortz survey respondent,
17 but these people, I've worked with these
18 people. They are very competent and they are
19 very diligent and they are very bright.

20 And they would have understood these
21 questions. It would not have been a difficult
22 task. They would have understood the
23 categories. They would have correctly
24 identified themselves as the person responsible
25 for making these types of decisions.

1 This would not have been a difficult
2 decision for them. I don't know how many of
3 these people Dr. Steckel worked with, and I
4 don't know where he derives his opinions from.

5 Q. Well, Dr. Steckel is an expert in
6 survey research.

7 A. Well, that's great. I don't know if
8 he knows any of these people or he has ever
9 worked with them. I don't know if he has ever
10 worked in television programming.

11 These people are diligent and bright
12 people who accurately answered this survey to
13 the best of their ability. There was nothing
14 in this survey that would have been complicated
15 for them.

16 Q. That's your opinion?

17 A. That's a fact.

18 Q. That's your opinion?

19 A. It's a fact.

20 JUDGE STRICKLER: Your turn.

21 (Laughter.)

22 JUDGE BARNETT: Enough.

23 THE WITNESS: Thank you.

24 MS. PLOVNICK: All right. I have no
25 further questions.

1 JUDGE BARNETT: Mr. Cantor, do you
2 have redirect?

3 MR. CANTOR: None, Your Honor.

4 JUDGE BARNETT: All right. Are we
5 finished with all of the cross-examination?
6 Then may Mr. Singer be excused?

7 Thank you, Mr. Singer, you may be
8 excused.

9 THE WITNESS: Thank you very much.
10 Thank you, counsel.

11 JUDGE BARNETT: And we will be at
12 recess until 1:05.

13 (Whereupon, at 12:06 p.m., a lunch
14 recess was taken.)

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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

)	
<i>In re</i>)	
)	
DISTRIBUTION OF CABLE)	NO. 14-CRB-0010-CD (2010-13)
ROYALTY FUNDS)	
)	

Written Direct Testimony of Nancy A. Mathiowetz, Ph.D.

December 22, 2016

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I. Qualifications

1. I am Professor Emerita, Department of Sociology at the University of Wisconsin-Milwaukee (UWM). Prior to joining the faculty at UWM in 2003, I was Associate Professor, Joint Program in Survey Methodology, University of Maryland and University of Michigan. I received a B.S. from the University of Wisconsin and a M.S. (Biostatistics) and Ph.D. (Sociology) from the University of Michigan. I served as co-Editor, *Public Opinion Quarterly* from 2008-2012 and as President, American Association for Public Opinion Research (AAPOR) from 2007-2008. In 2015 I was awarded the AAPOR Award for Exceptional Distinguished Achievement. Between 1998 and 2004, I was an associate editor of the *Journal of Official Statistics* and I have served as a reviewer for numerous other journals and publications. I am an elected Fellow, American Statistical Association. In recent years I have served as an advisor to the U.S. Energy Information Agency, the California Health Interview Survey, and the U.S. Bureau of Labor Statistics, as a member of technical panels of the National Academy of Sciences as well as a reviewer for the National Science Foundation and the National Institutes of Health, all with respect to my area of expertise, survey methodology. I have testified as an expert on survey research methodology in federal and state court cases.

2. My research focuses on various aspects of survey methodology, including, but not limited to, the effects of mode and methods of data collection, question and questionnaire design, response error, and means to assess and reduce various sources of error in the survey process. I have taught courses on survey

methodology, questionnaire design, and advanced statistical methods and have offered short courses on questionnaire design to various audiences. My curriculum vitae, which outlines my professional experience as well as my publications, is included as Appendix A.

II. Introduction and Summary

3. The Joint Sports Claimants (JSC) have asked that I review the 2010-13 cable operator surveys conducted by Bortz Media and Sports Group, Inc. (Bortz) and render my opinion on the methodology used to conduct the surveys. Bortz describes that methodology in a report entitled “Cable Operator Valuation of Distant Signal Non-Network Programming: 2010-13” (Bortz Report).

4. My review of the Bortz Report leads me to conclude that the 2010-13 Bortz Surveys provide a valid and reliable assessment of the relative market value of the different categories of distant signal programming that cable systems carried during the years 2010-13.

III. Background

5. The Copyright Office has explained that:

Section 111 of the Copyright Act of 1976, title 17 of the United States Code, established a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works. The license prescribes various conditions under which cable systems may obtain a compulsory license to retransmit copyrighted works [on broadcast television stations], including the filing of statements of account forms. It also establishes the requirements governing the form, and content of the filing of these semi-annual statements and submission of statutory royalty payments (http://www.copyright.gov/licensing/sec_111.html).

Royalties collected from cable system operators are distributed to the copyright owners of the programs on distant broadcast signals (claimants) via a process overseen by the Copyright Royalty Judges (CRJs). For the distribution of the 2010-2013 cable royalty funds, the agreed categories of claimants are the Canadian Claimants, Commercial Television Claimants, Devotional Claimants, Joint Sports Claimants, Music Claimants, National Public Radio, Program Suppliers, and Public Television Claimants (*Notice Of Participant Groups, Commencement Of Voluntary Negotiation Period (Allocation), And Scheduling Order*, Docket No. 14-CRB-0010-CD (2010-13), Nov. 25, 2015).¹

6. Cable system operators retransmit distant broadcast signals in their entirety under the Section 111 compulsory license. As a result, it is impossible to directly observe the market value of any one category of programming on those distant signals. For example, the distant signal being retransmitted may include sports programming, syndicated television shows, as well as locally produced shows, all for a given royalty set by law.

7. As the CRJs have observed:

All parties acknowledge that Congress did not set forth a statutory standard for cable royalty allocations...[F]or purposes of this proceeding, the parties are all in agreement that the sole governing

¹ The CRJs have observed that the Music Claimants category differs from the others because it “permeates all other program categories,” and accordingly the CRJs took a share for Music “off the top” before allocating the royalties among the other program categories (Federal Register, Vol. 75, No. 180, p. 57075). National Public Radio also is unique because its claim is not for television programming but rather is for radio broadcasts.

standard is the relative marketplace value of the distant broadcast signal programming retransmitted by cable systems during 2004 and 2005 (Federal Register, Vol. 75, No. 180, September 17, 2010, p. 57065).

Although there are different approaches to determining relative marketplace value, Bortz has used a constant sum survey of cable operators since 1983 to determine the relative value of different categories of distant signal programming retransmitted by cable systems pursuant to the Section 111 license. The history of Bortz's use of the constant sum methodology is outlined in Appendix A of the Bortz Report. Several market research and survey experts have offered testimony concerning the methodology of the Bortz surveys in prior royalty distribution proceedings.²

8. In their allocation of cable royalty funds for 2004-2005, the CRJs found that "the values of the program categories at issue among these contending claimants are most reasonably delineated by a range bounded by certain results indicated primarily by the Bortz constant sum survey" Federal Register, Vol. 75, No. 180, p. 57065. Similarly, in *Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress* (2003), concerning the distribution of 1998 and 1999 cable royalty funds, the Copyright Royalty Arbitration Panel (CARP) noted:

In conclusion, the Panel accepts the Bortz survey as an extremely robust (powerfully and reliably predictive) model for determining relative value for PS, JSC, and NAB-for both the Basic Fund and the

² I have reviewed the written direct testimony of Gregory Duncan (2004-2005 Proceeding), Joel Axelrod (1990-92 Proceeding), Leonard Reid (1989 Proceeding), and Samuel H. Book (1989 Proceeding), who supported Bortz, and the written direct testimony of Alan Rubin (1983, 1989, 2004-05 Proceedings), who criticized Bortz.

3.75% Fund. Indeed, for reasons discussed *infra*, we find that the Bortz survey is more reliable than any other methodology presented in this proceeding for determining the relative marketplace value of these three claimant groups (p. 31).

IV. Analysis of the 2010-13 Bortz Surveys

9. The Federal Judicial Center and National Academy of Sciences have published “The Reference Guide on Survey Research” (Diamond, 2011)—one of the chapters of the *Reference Manual on Scientific Evidence*. The purpose of this Reference Guide is to assist courts in evaluating the quality of a survey. I will use this Reference Guide as a framework for reviewing the methodology of the 2010-13 Bortz Surveys³.

A. Purpose and Design of Survey

10. Diamond (2011) begins by focusing on issues related to the purpose and design of the survey. She poses the following questions:

- Was the survey designed to address relevant questions?
- Was participation in the design, administration, and interpretation of the survey appropriately controlled to ensure the objectivity of the survey?
- Are the experts who designed, conducted, or analyzed the survey appropriately skilled and experienced?

11. I believe that the 2010-13 Bortz surveys are designed to address the relevant question of interest, specifically, the relative value associated with specific categories of distant signal programs. The surveys continue (and improve upon) previous surveys conducted by Bortz and relied on by the CRJs and their predecessors in rendering decisions concerning copyright royalty distributions. The

³ I note that not all of the questions posed in the Reference Guide are relevant to the design and administration of the Bortz surveys; only those questions identified by Diamond (2011) that are relevant to the present discussion are included in my opinion.

fact that previous versions of a similar questionnaire and approach were used by the CRJs in their royalty distributions supports both the validity and the relevance of the methodology and, specifically, Question 4 concerning relative program values.

12. The questions used in the 2010-13 Bortz Surveys are clear and objective and relevant to the issue at hand. Interviewers and respondents were blinded to the use of the data, reducing bias that may be related to knowledge of the survey sponsor or related to the use of the data.

13. For over thirty years, Bortz has been engaged in the design and analysis of surveys presented to the CRJs and their predecessors. In addition, the data collection organization retained by Bortz, THA Research, provides market research to the cable and television industry and has extensive research experience interviewing executives. In my opinion, both the designers of the survey and the members of the data collection organization are appropriately skilled and experienced.

B. Population Definition and Sampling

14. Diamond continues in her outline, focusing on issues related to population definitions and sampling with the following three questions:

- Was an appropriate universe or population identified?
- Did the sampling frame approximate the population?
- Does the sample approximate the relevant characteristics of the population?

15. The focus of the 2010-13 Bortz Surveys was “Form 3” cable systems. Form 3 operators are those cable systems that had at least \$527,600 in semi-annual “gross

receipts” from retransmissions (see Bortz Report, p. 10). Although focusing on “Form 3” cable systems excludes Form 1 and 2 systems, as noted by Bortz, Form 3 systems account for more than 98 percent of total royalty payments, according to the Cable Data Corporation.⁴ With coverage of over 98% of the royalty payment universe, “Form 3” systems are the appropriate population elements on which to focus.

16. The sampling frame –that is, the universe of interest –was comprised of statements of account filed by cable systems with the Copyright Office for the first accounting period of each survey year (Bortz Report, p. 11). This set of records used as the sampling frame for the survey mirrors the population of interest.

17. The cable operator survey utilized a stratified random sample of “Form 3” cable system operators. Copyright royalty payments were used as the classification variable for stratification of the sample. Specifically, for each year 2010-2013, the cable systems were divided into four strata, based on royalty class. The use of a stratified sample results in an efficient sample that assures that the resulting sample mirrors the population of interest (as compared to a simple random sample). In addition, a stratified sample leads to more efficient standard errors (margins of error) around the resulting estimates (once again, in comparison to a simple random sample).

⁴ Bortz also notes that it would not be feasible to include Form 1 and 2 systems in the survey because they file simpler accounting statements that do not specifically identify the distant signals carried on those systems (see Bortz, p. 10).

18. As outlined by Bortz (pp. 11-12), the sample for each of the four years, 2010-2013, consisted of four strata with disproportionate sampling so as to most efficiently maximize representation of those cable system operators who account for the largest royalty payments. In my opinion, the resulting sample fully reflects the population of interest.

C. Survey Implementation

19. Diamond (2011) follows the questions concerning the sample design with ones that address implementation:

- What is the evidence that nonresponse did not bias the results of the survey?
- What procedures were used to reduce the likelihood of a biased sample?
- What precautions were taken to ensure that only qualified respondents were included in the survey?

20. The survey of cable systems operators was conducted as a telephone interview with the person most responsible for programming decisions serving as the respondent. Overall, the survey achieved high response rates, ranging from 51.8% to 56.6% for the four years. These are considered high response rates; it is not uncommon for high quality telephone surveys conducted by organizations such as the Pew Research Center to achieve response rates in only the 10% to 20% range.

21. The number of completed interviews per year ranged from 160 to 170 and represents between 28 and 40 percent of royalties paid for the respective years (Bortz Report, p. 21). The number of completed interviews provides a reliable base for estimation for each of the years.

22. Nonresponse bias is a function of both the nonresponse rate as well as the difference between respondents and nonrespondents on the key statistic of interest, in this case, relative program valuation. As noted above, the high rate of response is impressive for a telephone survey. In addition, high response rates were achieved consistently across each of the strata, thereby reducing concerns related to differential nonresponse (see Bortz Report, Table II-1, p. 13).

23. The use of a probability based, stratified sample, drawn from the universe of all Form 3 cable system operators, ensures that the sample was not biased.

24. The interviewers used for the study had at least 5 years of experience interviewing executives. Interviewers were trained to request to speak to the individual initially identified as responsible for programming decisions from industry sources and to confirm that he or she was the person “most responsible for programming carriage decisions” (Bortz Report, p. 22). If the individual was not the appropriate person, he or she was asked to identify that person; the eventual respondent did confirm his or her responsibility for the programming carriage decisions. Table II-4 (p. 23) of the Bortz report lists the job titles of the respondents for each of the four years. These procedures ensured that only qualified respondents were included in the survey.

25. With respect to the sample design and implementation, it is my opinion that the survey of cable system operators conducted by Bortz meets or exceeds current industry standards.

D. The Survey Instrument

26. Turning to the survey instrument, Diamond (2011) identifies the following as key issues relevant⁵ to the Bortz survey:

- Were questions on the survey framed to be clear, precise, and unbiased?
- Did the survey use open-ended or closed-ended questions?
- If probes were used to clarify ambiguous or incomplete answers, what steps were taken to ensure that the probes were not leading and were administered in a consistent fashion?
- What approach was used to avoid or measure potential order or context effects?

27. For the 2010-2013 cable operator survey, Bortz made significant changes in the design of the questionnaire, in response, in part, to comments offered by the CRJs during the 2004-2005 hearings (Federal Register, 2010, p. 57063). These changes resulted in new introductory questions, an improved wording of the key question of interest concerning relative values among program categories, a new protocol used for interviewing cable system operators of WGN programs, and a new protocol for surveying operators carrying a large number of distant signals. Each of these changes (outlined in detail below), in my opinion, improved the survey instruments and resulted in questions that were clear, precise, and unbiased.

28. In previous cable system operator surveys, the initial questions in the survey asked about the popularity of specific programming and the use of distant signal

⁵ I did not include the following items identified by Diamond (2011), since I did not find them relevant to the Bortz survey: (1) "Were some respondents likely to have no opinion? If so, what steps were taken to reduce guessing?"; and (2) "If the survey was designed to test a causal proposition, did the survey include an appropriate control group or questions."

programming in advertising. Neither of these topics is necessarily a good primer for the key question of interest, specifically the relative value of program categories included in distant signals.

29. In response to the CRJs' comments (Federal Register, 2010, p. 57063), Bortz modified the introductory questions for its 2010-2013 surveys. The introductory questions begin by reviewing the specific distant signals carried by the system, and then asked the respondent to rank the importance of the relevant programming categories (that is, the subset of categories actually transmitted by the system⁶) and to rank the hypothetical costs associated with obtaining each category of programs. These questions serve as useful primers for the respondent, discussing the program categories that are of interest for the key question, that is, the relative value question (Question 4 in the survey).

30. The key question concerning relative value of programming categories was also modified for the 2010-2013 surveys in light of the opinions offered by the CRJs in 2004-2005. Previous wording for the relative value question requested that the respondent value the program categories with respect to "attracting and retaining subscribers." While this may be an important aspect for programming decisions, the CRJs in rendering their opinion for the 2004-2005 royalty distribution opined that other factors may also contribute to value placed on programming categories. In

⁶ The categories included movies; live professional and college team sports; syndicated shows, series, and specials; news and other station-produced programs; PBS and all other programming broadcast by noncommercial stations; devotional programs; and all programming broadcast by Canadian stations.

response to that concern, the revised wording for the 2010-2013 survey simply asks the respondent to “estimate the relative value to your cable system of each category of programming actually broadcast by the stations . . .” The revised wording allows the respondent to consider all aspects of a program’s value.

31. The methodology used for the key question is a constant sum methodology, a type of open-ended question. A constant sum question asks the respondent to divide their “sum” (e.g., dollar budget or 100%) across a fixed number of categories. An advantage of the constant sum methodology over other question formats – most specifically importance scales – is that it forces the respondent to think carefully about their choices and to order their relative preferences⁷.

32. The constant sum methodology has been used to determine the comparative value of distant signal non-network programming by Bortz since 1983.

33. Although the constant sum methodology can be burdensome to respondents if the number of categories is extensive, the present application limits the respondent to seven or fewer categories for the allocation of the 100%. This is a reasonable task for the respondents to undertake and, in my opinion, the constant sum methodology is an appropriate methodology when asking respondents to determine relative value of various attributes, or in this case, specific categories of programming.

⁷ In contrast, respondents facing a rating scale can rank all program categories equally important.

34. The constant sum methodology is a well-established market research tool.

Support for the use of constant sum methodology has been offered in previous proceedings by a number of experts. For example, Dr. Samuel Book noted:

The constant sum method utilized in the Bortz study is appropriate for the purpose of assessing how cable operators would have allocated programming budgets among distant signal non-network programming categories. In fact, I do not believe there would have been any better way of determining how cable operators would have allocated their programming budgets. Constant sum surveys are often used in cable industry market research, and they are relied upon in the cable industry, especially in research situations where respondent trade-offs must be considered. See Written Direct Testimony of Samuel H. Book (1989 Proceeding) (JSC Ex. 3 at 2).

35. Others have concurred with Dr. Book's assessment; Dr. Leonard Reid stated that the "constant sum technique, such as that employed in the 1989 JSC survey, is a valid and well-accepted research tool." See Written Direct Testimony of Leonard Reid (1989 Proceeding) (JSC Ex. 14 at 3). Dr. Joel Axelrod indicated that "the constant sum technique is widely used and its predictive validity for purchase behavior has been amply documented in my published research as well as research reported by Haley and Case." See Written Direct Testimony of Joel Axelrod (1990-92 Proceeding) (JSC Ex. 2 at 3). As noted by Dr. Robert Crandall, "the constant sum survey is the best tool to answer the question presented in this proceeding." See Written Direct Testimony of Robert Crandall (2004-2005 Proceeding) (JSC Ex. 4 at 7).

36. One of the advantages of using interviewers for data collection (as compared to web-based or mail surveys) is that interviewers can assist respondents for whom

the task may be difficult. The interviewer instructions for Question 4 included the requirement that the interviewer prompt respondents if the valuations across the relevant categories did not sum to 100%.

37. In addition, once the respondent completed the valuation question, the interviewer reviewed the estimates with the respondent and queried them as to whether or not there were any changes to be made. In doing so, the respondent has the opportunity to further consider his or her responses, an approach that ensures for high quality of the resulting estimates.

38. As a means to reduce potential order or context effects related to the relative values assigned to the various program categories, the presentation order of the program categories was rotated across respondents. That is, for some respondents, the first category for which a valuation was requested may have been “movies” but “movies” was not consistently presented as the first category.

39. The retransmission of WGN programming presents a challenge with respect to valuations, since WGN retransmissions include both compensable and non-compensable programs. In their 2004-2005 distribution decision the CRJs commented on this issue (see Federal Register, 2010, p. 57067). To address the issue of non-compensable programming on WGN, for the 2010-2013 surveys, cable system operators who carried only WGN as their distant signal were provided a WGN programming summary identifying the compensable programming broadcast in the relevant year. These cable system operators were instructed to respond to the survey only with respect to these specific compensable programs. This change is an

important clarification for those operators for whom WGN is the only distant signal purchased.⁸

40. Changes in interviewing protocol were also adopted for those cable system operators with a large number of distant signals. The consolidation of cable systems (with respect to copyright reporting purposes) has led to an increased number of cable systems carrying nine or more distant signals. An analysis conducted by Bortz of systems with more than eight distant signals found that more than 93 percent of the signals that ranked ninth or lower in distant reach were carried as distant signals to fewer than 5 percent of the system's subscribers, and those signals accounted for less than 1 percent of royalty fees generated by all Form 3 systems that carried any U.S. commercial distant signals over the 2010-13 period (see Bortz Report, p. 35). As a result of this limited reach, cable system operators that carried nine or more distant signals were asked about only the eight most widely carried distant signals on the system. In my opinion, reducing the burden in this way for large cable system operators would most likely improve the quality of the reported data with little to no resulting bias in the resulting estimates.

E. Data Collection and Processing

41. Diamond (2011) also offers guiding questions with respect to mode of data collection and the use of interviewers:

- What limitations are associated with the mode of data collection used in the survey?

⁸ Note that this change has no impact on those cable systems for whom WGN is one of several distant signals purchased.

- Were interviewers appropriately selected and trained?
- Did the interviewers know about the survey and its sponsorship?
- What procedures were used to ensure and determine that the survey was administered to minimize error and bias?

In addition, she discusses post survey processing by asking⁹:

- What was done to ensure that the data were recorded accurately?

42. As noted above, the cable operator survey was conducted by telephone. The use of a telephone for data collection is an appropriate mode, especially for an establishment survey. The use of telephone data collection ensures the identification of an appropriate respondent for the survey. Telephone data collection also is efficient (less costly than face to face data collection) while offering the advantages of an interviewer (higher response rates and the ability to address respondents' questions).

43. All of the interviewers used for this data collection were experienced in conducting interviews with executives. They were not aware of the sponsor for the survey. Interviewers were monitored to ensure proper interviewing and recording of responses (see Bortz Report, p. 20).

44. Data entry was completed by Bortz. Personnel compared entered data to hard copy questionnaires to confirm the accuracy of the entered data (see Bortz Report, p. 23). The verification procedure was completed twice.

⁹ I have not included the following question raised by Diamond (2011), since it is not relevant to the present study or analysis: "What was done to ensure that the grouped data were classified consistently and accurately?"

F. Disclosure and Reporting

45. The final set of questions that Diamond (2011) suggests as guidelines to understanding the quality of surveys and survey data address disclosure and reporting:

- When was the information about the survey methodology and results disclosed?
- Does the survey report include complete and detailed information on all relevant characteristics?
- In surveys of individuals, what measures were taken to protect the identities of individual respondents?

46. All details concerning the methodology used by Bortz in conducting the survey of cable system operators are included in the Bortz Report, including, but not limited to, the identification of the population, detailed information about the sampling frame and the sampling procedures, information concerning completion rates, questionnaire design, interviewer training, and estimates based on the survey data including the means by which to estimate the margin of error.

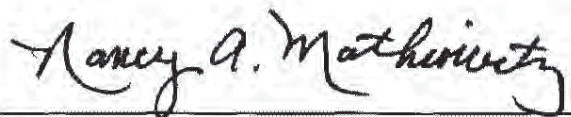
47. There is no information in the Bortz Report that reveals the identity of the individual cable system operators or the identity of the specific respondents. The Bortz Report further notes that survey respondents “were assured that their responses would be kept confidential (i.e., results would be reported only in an aggregated form)” (p. 22).

V. Conclusions

48. The 2010-13 surveys of cable system operators conducted by Bortz continue a long series of similar surveys that employed constant sum methodology for the

estimation of relative program value related to distant signal retransmissions. The sample design and implementation as well as the questionnaire design all meet or exceed the guidelines as outlined by Diamond (2011) in the *Reference Manual on Scientific Evidence*. The similarity of estimates within categories across the years speaks to the reliability of the sampling and measurement process. It is my professional opinion that the resulting data offer both a valid and reliable estimate of the relative program values for distant signal retransmissions among cable system operators during the years 2010-13.

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, reading "Nancy A. Mathiowetz". The signature is written in a cursive style with a horizontal line underneath the name.

Nancy A. Mathiowetz

APPENDIX A

Nancy A. Mathiowetz

RESEARCH AND TEACHING INTERESTS

Survey methodology, research design and methods, quantitative methods, and statistics.

EDUCATION

University of Wisconsin, Madison, Wisconsin

B.S., Sociology (with honors), 1978

University of Michigan, Ann Arbor, Michigan

M.S., Biostatistics, 1983

Ph.D., Sociology, 1988

Dissertation: *The Applicability of Cognitive Theory to Long-Term Recall Questions in Social Surveys*

PROFESSIONAL EXPERIENCE

2015-	Professor Emerita, University of Wisconsin-Milwaukee
2005-2015	Professor, Sociology Department, University of Wisconsin-Milwaukee
2006-2009	Chair, Sociology Department, University of Wisconsin-Milwaukee
2003-2005	Associate Professor, Sociology Department, University of Wisconsin-Milwaukee
2001-2003	Associate Professor, Joint Program in Survey Methodology, University of Maryland; Adjunct Associate Research Scientist (Institute for Social Research) and Adjunct Associate Professor (Sociology Department), The University of Michigan
1995-2001	Assistant Professor, Joint Program in Survey Methodology, University of Maryland; Adjunct Assistant Research Scientist (Institute for Social Research) and Adjunct Assistant Professor (Sociology Department), The University of Michigan
1997-1998	ASA/NSF Fellowship, Bureau of Labor Statistics
1992	Guest Professor, Zentrum für Umfragen, Methoden und Analysen, Germany

1992-1995	Deputy Director, Division of Statistics and Research Methodology, Agency for Health Care Policy and Research
1993-1995	Adjunct Assistant Professor, Joint Program in Survey Methodology, University of Maryland
1990-1992	Special Assistant to the Associate Director, Statistical Design, Methodology, and Standards, U.S. Bureau of the Census
1987-1990	Senior Research Analyst, National Center for Health Services Research
1984-1987	Senior Research Associate, Westat, Inc.

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- Joel Leon, Tamra Lair, Pamela Farley Short, and Nancy A. Mathiowetz (1989) "1987 National Estimates of the Functionally Disabled Elderly: Policy Implications of Varying Definitions of Disability," Winter Meetings of the American Statistical Association.
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Robert M. Groves, Lou J. Magilavy, and Nancy A. Mathiowetz (1980) "The Process of Interviewer Variability: Evidence from Telephone Surveys," *Proceedings of the Section on Survey Research Methods*, American Statistical Association.

Robert M. Groves, Marianne Berry, and Nancy A. Mathiowetz (1980) "Some Impacts of Computer Assisted Telephone Interviewing on Survey Methods," *Proceedings of the Section on Survey Research Methods*, American Statistical Association.

RESEARCH REPORTS

Nancy A. Mathiowetz, Kristen Olson, and Courtney Kennedy (2011) "Redesign Options for the Consumer Expenditure Survey." Prepared for the National Academy of Sciences (DBASSE-004950-0001-031411).

Nancy A. Mathiowetz (2010) "Self and Proxy Reporting in the Consumer Expenditure Survey Program." Paper prepared for the Consumer Expenditure Methods Workshop, Bureau of Labor Statistics.

Nancy A. Mathiowetz (1998) "The Impact of Biannual Interviewing on Nonresponse and Measurement Error." Paper commissioned by the National Longitudinal Study Technical Review Committee.

Nancy A. Mathiowetz. (1994) "Autobiographical Memory and the Validity of Survey Data: Implications for the Design of the Panel Study of Income Dynamics." Paper commissioned by the Panel Study of Income Dynamics Technical Advisory Board.

Nancy A. Mathiowetz, Mick P. Couper, and Eleanor Singer (1994) "Where does all the Mail Go? Mail Receipt and Handling in U.S. Households." Survey Methodology Program Working Paper No. 25. Ann Arbor: University of Michigan.

John F. Moeller, Nancy A. Mathiowetz, and Steven B. Cohen (1989) *Prescription Drugs: Use and Expenditures by Medicare Beneficiaries*, Report to Congress.

John F. Moeller and Nancy A. Mathiowetz (1989) *Prescribed Medicines: A Summary of Use and Expenditures by Medicare Beneficiaries*, National Medical Expenditure Survey Research Findings 3, Rockville, MD.

A. Vinokur, C. Cannell, S. Eraker, F. Juster, and N. Mathiowetz (1983) *The Role of Survey Research in the Assessment of Health and Quality of Life Outcomes of Pharmaceutical Interventions*. Monograph prepared for the Pharmaceutical Manufacturers Association.

EDITORIAL ACTIVITIES

Associate Principal Investigator, Time-Sharing Experiments for the Social Sciences (TESS), 2012–
Editor, *Public Opinion Quarterly*, 2008-2012
Associate Editor, *Public Opinion Quarterly*, 2004 -2007
Associate Editor, *Journal of Official Statistics*, 1998-2004
Reviewer, John Wiley Series in Survey Methodology
Reviewer, *Journal of the American Statistical Association*
Reviewer, *Survey Methodology*
Reviewer, *Journals of Gerontology*
Reviewer, *Reference Manual on Scientific Evidence*, Federal Judicial Center

TEACHING

Courses

Methods of Research and Analysis for Urban Social Institutions (Soc 982)
Advanced Statistical Methods in Sociology (Soc 760)
Fundamentals in Survey Methodology (Soc 752)
Questionnaire Design (Soc 754)
Research Methods in Sociology (Soc 362)
Data Collection Methods in Survey Research
Survey Management
Survey Practicum

Invited Lectures, Short Courses and Workshops

Questionnaire Design, University of Wisconsin Executive Education, 2004
Methodological Issues in the Measurement of Disability, United Nations, November, 2000
Survey Design for Response Quality in Household Surveys, 2000, Invited two-day workshop, Statistics Sweden, 2000
Survey Management, 1999, one-day short course, Department of Agriculture
Survey Management, 1998, one-week course, Summer Institute in Survey Research Techniques, Institute for Social Research, University of Michigan
Survey Management, 1998, two-day short course, JPSM Short Course
An Introduction to Pretesting, two-day short course, 1997, JPSM Short Course
Invited Lecture, Dartmouth College, 1997
Telephone Survey Design, one-week course, Summer Institute in Survey Research Techniques, Institute for Social Research, University of Michigan
Invited Scholar, Iowa State University, 1996
Questionnaire Design, 1995, half-day course, American Association of Public Opinion Research

Graduate Student Advising

Mark Caldwell, Ph.D. Dissertation Committee, 2014-2015
Marcella Blom-Willis, MA Chair, 2014-2015
Elisabeth Callahan, MA Chair, 2014-2015
Lee Chang, MA Chair, 2013-2014
Erica Svojse, MA Chair, 2013-2014
Kate Brown, MA Member, 2013-2014
Rachel Custasis, MA Chair, 2012- 2013
Brendan Held, MA Chair, 2012-2013
Ben Gilbertson, MA Member, 2012- 2013
Kara Ritchardt, MA Member 2012- 2013
Maureen Pylman, Ph.D. Prelim Chair, 2012-2013
Brienne Schreiber, Sociology, MA, Chair, 2011-2012
Atiera Coleman, Sociology, MA, Member, 2011-2012
Crystal Mathes, Sociology, MA, Member, 2011-2012
Jackie Austin, Sociology, MA, Chair, 2010-2011
Liz Grimm, Human Movement Sciences, Ph.D., 2010-2011
Matt Wagner, Urban Studies Program, Ph.D., 2008
Kirsten Brown, Sociology, MA, Chair, 2007-2008
Peter Barwis, Sociology, MA, Member, 2006-2007
Heather Price, Sociology, MA, Member, 2006-2007
Georgiann Davis, Sociology, MA, Chair, 2005-2006
Leslie Mason, Sociology, MA, Chair, 2005-2007
Kyle Poppie, Sociology, MA, Member, 2006-2007
Molly Simmerman, Sociology, MA, Chair, 2006-2007
Adam Lippert, Sociology, MA, Member, 2006
Julie Weeks, Sociology, Ph.D. Committee, 1999-2000
Jill Walston, Education Measurement and Statistics, Ph.D. Committee, 1999-2000

PROFESSIONAL ACTIVITIES

American Association for Public Opinion Research

Recipient, AAPOR Award for Exceptionally Distinguished Achievement, 2015
Past President, 2008-2009
President, 2007-2008
President-elect/Vice President, 2006-2007
Chair, Standards Committee, 2005-2006
Associate Chair, Standards Committee, 2004-2005
Secretary-Treasurer, 1995-1996
Chair, Education Committee, 1995-2001
Associate Secretary-Treasurer, 1994-1995
Membership Chair, 1990-1991
Associate Membership Chair, 1989-1990

American Statistical Association

Elected Fellow, American Statistical Association, 2012
Member, Survey Review Committee, 2001-2003
Member, Census Advisory Committee, 2000-2002
Member, Committee on Statistics and Disability, 2000-2006
Member, Committee on Meetings, 1997-2001
Member, E.C. Bryant Scholarship Committee, 1997-2003
Program Chair, Section on Survey Research Methods, 1995-1996
Program Chair-Elect, Section on Survey Research Methods, 1994-1995
Member, Continuing Education Committee, 1988-1990
Chair, Continuing Education Winter Conference, 1988-1989
Member, Survey Research Methods Technical Advisory Committee on SIPP, 1986-1990

Advisory Committees

American Statistical Association Committee on Energy Statistics, 2010- 2015
Bureau of Labor Statistics, Consumer Expenditure Survey Expert Panel, 2010
California Health Interview Survey Technical Advisory Committee, 2009-
National Center for Health Statistics, Board of Scientific Counselors, Long Term Care
Program Review Panel, 2009
National Academy of Science, Committee on National Statistics, Panel to Review U.S.
Department of Agriculture's Measurement of Food Insecurity and Hunger,
2004-2005
National Advisory Board, Institute for Research on Poverty, University of Wisconsin,
Wisconsin Works Child Support Demonstration, 1998-2001
National Gambling Commission, Technical Advisory Panel, 1998
National Longitudinal Survey of Children and Families in the Child Welfare System,
Technical Advisory Panel, 1998-2000
Substance Abuse and Mental Health Services Administration, Technical Advisory
Committee, 1997
National Longitudinal Surveys Technical Review Committee, Bureau of Labor
Statistics, 1993-1999
Bureau of Labor Statistics, Invited Panel Member, Questionnaire Design Advisory
Conference for the Consumer Expenditure Survey and Current Population
Survey, 1987

Grants Review

National Institutes of Health, Biostatistical Methods and Research Design Study
Section, Member, 2003-2007 and various special emphasis panels, 2008-
Russell Sage Foundation, 2000
National Science Foundation, 1998-
National Institute of Health, Reviewer, Mental Health AIDS and Immunology Review
Committee, 1996

Reports Review

National Academy of Science, Reviewer, *Conducting Biosocial Surveys*, 2010
U.S. Department of Agriculture, Reviewer, *Continuing Survey of Food Intake*, 1996
National Academy of Sciences, Reviewer, *Report on Survey of Scientists and
Engineers*, 1991

Miscellaneous

Organizer, Interviewer-Respondent Interaction Workshop, Boston, MA May, 2013
Chair, Charles Cannell Fund in Survey Methodology, 2003-
Federal Committee on Statistical Methodology, Member, Subcommittee on
Statistical Training, 1995-1999
Social Science Research Council, Invited Participant, Workshop on the Cognition and
Measurement of Pain, 1987
Social Science Research Council, Invited Participant, Seminar on Effect of Theory-
Based Schemas on Retrospective Data, 1987

University of Wisconsin-Milwaukee

Faculty Chair, Zilber School of Public Health, 2014-2015
Chair, School of Public Health Founding Dean Search Committee, 2010-2011
Member, School of Public Health Executive Committee, 2010-2011
Chair, Merit Committee, Sociology Department, 2010-2013
Member, School of Public Health Planning Council, 2007- 2009
Member, Division of Social Sciences Executive Committee, 2005-2008
Official Representative to the Inter-University Consortium for Political and Social
Research, 2003-2007
Chair, Recruitment Committee, Department of Sociology, 2005; 2012
Chair, Curriculum Committee, Urban Studies Program, 2004-2005; 2010-2012
Member, Research Committee, Center for Age and Community, 2003-2005
Member, Applied Gerontology Certificate Committee, 2004-2006
Member, Executive Committee, Urban Studies Program, 2005
Member, Graduate Committee, Sociology Department, 2005-2009; 2012-2015

Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

)	
<i>In re</i>)	
)	
DISTRIBUTION OF CABLE)	NO. 14-CRB-0010-CD (2010-13)
ROYALTY FUNDS)	
)	

Written Rebuttal Testimony of

NANCY A. MATHIOWETZ
September 15, 2017

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I. QUALIFICATIONS

1. I am Professor Emerita, Department of Sociology at the University of Wisconsin-Milwaukee (UWM). Prior to joining the faculty at UWM in 2003, I was Associate Professor, Joint Program in Survey Methodology, University of Maryland and University of Michigan. My research focuses on various aspects of survey methodology, including, but not limited to, the effects of mode and methods of data collection, question and questionnaire design, response error, and means to assess and reduce various sources of error in the survey process. I have taught courses on survey methodology, questionnaire design, and advanced statistical methods and have offered short courses on questionnaire design to various audiences. I have testified as an expert on survey research methodology in federal and state court cases.

2. My qualifications as an expert on survey research methodology are set forth in greater detail in Appendix A to my written direct testimony in this proceeding on behalf of the Joint Sports Claimants (JSC) (dated December 22, 2016).

II. INTRODUCTION AND SUMMARY

3. My written direct testimony discusses the 2010-13 cable operator surveys conducted by Bortz Media & Sports Group, Inc. (Bortz surveys). As I explain in that testimony, the Bortz surveys provide a valid and reliable assessment of the relative market value of the different categories of distant signal programming that cable systems carried during the years 2010-13. The purpose of my rebuttal testimony is to address the written direct testimony submitted in this proceeding by (1) Joel Steckel, Ph.D., Howard Horowitz, and Martin R. Frankel, Ph.D., on behalf of the Program Suppliers; and (2) Debra J. Ringold, Ph.D. on behalf of the Canadian Claimants Group.

4. The testimony of Dr. Joel Steckel is a critique of surveys of cable system executives, that is, the methodology used by both Horowitz and Bortz in their respective data collection efforts. In my opinion, Dr. Steckel is incorrect to assert that cable operator surveys are inadequate for assessing the issue of relative market value in this proceeding. Dr. Steckel's criticism are far ranging; he asserts that the surveys do not measure market value, sample the wrong population (cable system operators), and result in invalid data due to the nature of the key constant sum question (which he considers too complex) and the mode of data collection (telephone). These criticisms have been raised in previous proceedings; the Copyright Royalty Judges (CRJs) in the Distribution of the 2004 and 2005 Cable Royalty Funds noted, "Yet, whether taken individually or viewed as a group, we do not find these other criticisms to undermine the general usefulness of the Bortz survey for the purpose offered" (Federal Register, Vol. 75, September 17, 2010, p. 57068). I provide below (see Section III) detailed responses to Dr. Steckel's arguments against the use of the Bortz survey data.

5. The testimony of Howard Horowitz and Dr. Martin Frankel present the methodology and findings from surveys conducted in 2010-2013 ("Horowitz surveys"); the methodology used in the Horowitz surveys is similar to that used by Bortz for the JSC. However, there are key differences in the design and implementation of the Horowitz survey and the Bortz survey that I discuss below. The testimony of Dr. Debra Ringold describes the methodology and findings from surveys conducted in 2010-2013; in contrast to the Bortz and Horowitz surveys, the Ringold/Ford surveys are limited to the assessment of the relative value of programming on Canadian Signals.

6. While properly designed cable operator surveys are useful for assessing relative value in this proceeding, my review of the Horowitz survey and the Ford/Ringold survey leads me to conclude that the flaws in each of these surveys renders them neither reliable nor valid for the production of valuation estimates. As detailed below (Section IV), the Horowitz survey design suffers from a number of significant flaws, most notably the inclusion of incorrect and misleading information as part of the questions posed to the respondents. In addition, the implementation methodology places undue burden on the respondents, asking executives to provide information for the full universe of CSOs (not just the sampled CSOs) as well as asking executives to report about a large number of CSOs, often in a single questionnaire.

7. With respect to the Ford/Ringold survey, the analytic sample is biased, giving preference to French-language systems, and its small sample size leads to unreliable estimates. Other concerns with the Ford/Ringold survey are detailed below (Section V).

III. DR. STECKEL'S CRITICISMS OF THE BORTZ SURVEY ARE WITHOUT MERIT

8. Dr. Joel Steckel criticizes both the Horowitz and Bortz surveys. He asserts that the surveys do not measure market value, sample the wrong population (cable system operators), and result in invalid data due to the nature of the key constant sum question (which he considers too complex) and the mode of data collection (telephone). Dr. Steckel advocates for surveying the consumers of cable system programming, the subscriber, as opposed to surveying cable system operators. These are not new arguments in these proceedings—for example, each of these points was previously made

by Program Suppliers' expert Dr. Alan Rubin, whom Dr. Steckel cites (p. 34)¹—and despite these arguments the CRJs, their predecessors and the courts repeatedly have found the Bortz survey to be useful in determining the appropriate allocation of copyright royalties.

9. I disagree with Dr. Steckel's assessment of the two surveys.² In reviewing Dr. Steckel's critique, I will draw upon Diamond's "Reference Guide on Survey Research," one of the chapters of the *Reference Manual on Scientific Evidence, Third Edition* (2011).³ Diamond frames her chapter as responses to a series of questions, several of which speak directly to the concerns raised by Dr. Steckel. These questions include:

- Was the survey designed to address relevant questions?
- Was an appropriate universe or population identified?
- Were questions on the survey framed to be clear, precise and unbiased?
- What limitations are associated with the mode of data collection used in the survey?

Dr. Steckel also raises other concerns that do not align with the *Reference Manual*. I will address these issues at the end of this section.

¹ Like Dr. Steckel, Dr. Rubin argued that the appropriate population to survey was not cable system operators but cable subscribers (*e.g.*, September 2009 Corrected Testimony of Alan M. Rubin, pp. 4, 9-14); that the Bortz constant sum question was too complex (*e.g.*, November 1991 Testimony of Alan M. Rubin, pp. 10-11; October 1985 Testimony of Alan M. Rubin, pp. 5-6); and that the surveys should not have been conducted over the telephone (*e.g.*, November 1991 Testimony of Alan M. Rubin, p. 7).

² I note that Dr. Steckel's review of the Bortz survey relies on the 2004-2005 Bortz surveys and does not reflect multiple changes made in the methodology for the 2010-2013 Bortz surveys, and therefore a number of his criticisms are inapplicable to the Bortz surveys at issue in these proceedings.

³ Dr. Steckel cites to a brief discussion of survey research in the *Manual for Complex Litigation* (4th ed. 2004), which includes some similar criteria to, but is less comprehensive than, Diamond's chapter in the 2011 *Reference Manual*.

A. Was the survey designed to address relevant questions?

10. The language used by the CRJs in the Distribution of the 2004 and 2005 Cable Royalty Funds (Federal Register, Vol. 75, September 17, 2010) states:

...the sole governing standard is the relative marketplace value of the distant broadcast signal programming retransmitted by cable systems during 2004 and 2005 (p. 57065).

Dr. Steckel asserts that the Bortz and Horowitz surveys' measurements of the cable system operators' valuations do not correspond to the marketplace value standard. As Dr. Steckel acknowledges (p. 22), the Copyright Arbitration Royalty Panel (CARP) determined that the constant sum question posed in the Bortz survey "is largely the question the Panel poses when it constructs a simulated market" (Report of the CARP in Docket No. 94-3 CARP CD 90-92, p. 65 (May 31, 1996)).⁴ The CARP further stated that the Bortz survey was "focused more directly than any other evidence to the issue presented: relative market value" (*Id.*).

11. Dr. Steckel contends that the CARP was incorrect. However, subsequent decisions in statutory royalty proceedings likewise have found that the Bortz survey is well-suited to assessing the relative market value of different types of programming to cable system operators (CSOs) in the hypothetical market. For example, in approving the CARP allocation of the 1998-99 cable royalties, the Librarian of Congress approved the CARP's reliance on the Bortz survey and cited the CARP's determination "that the Bortz survey best projected the value of broadcast programming in the hypothetical

⁴ The Librarian of Congress adjusted the CARP's royalty allocations to account for settlements of claims by the Music Claimants and National Public Radio, and to correct errors in the apportionment of "3.75 Funds," and otherwise approved the CARP's determination; the Librarian's decision was affirmed on appeal. *National Association of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998).

marketplace . . .” (Federal Register, Vol. 69, January 26, 2004, p. 3609). The Librarian’s decision was affirmed in an appellate decision stating: “Nor did the CARP act unreasonably in declining to rely on Nielsen for direct evidence of viewing, as Bortz adequately measured the key criterion of relative market value. Moreover, as the CARP put it, Bortz ‘subsumes *inter alia* all viewing data that a CSO might consider when assessing relative value of programming groups.’” *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 402 (D.C. Cir. 2005). The court further observed that “[t]he Bortz survey, supplied by JSC, measures what CSOs perceive as the relative market value of different types of programming.” *Id.* at 398. Similarly, the CRJs’ decision allocating the 2004-05 cable royalties found “the Bortz study to be the most persuasive piece of evidence provided on relative value in this proceeding” and that “[t]he Bortz intervals certainly mark the most strongly anchored range of relative programming values produced by the evidence in this proceeding” (Federal Register, Vol. 75, September 17, 2010, pp. 57066, 57068).

12. Based on the historical comments of the CRJs, CARP, the Librarian, and the Court of Appeals, it appears that both the Bortz and Horowitz surveys, by focusing on the relative valuations placed on program categories by cable system operators, are in fact addressing the relevant question of interest.

B. Was an appropriate universe or population identified?

13. Dr. Steckel criticizes both the Bortz and Horowitz surveys for surveying cable system operator executives. Specifically, he maintains that “the relevant opinions for projecting marketplace results are not those of cable executives; they are those of cable customers” (p. 40). He goes on to state, “If you want to know what customers (*i.e.*, the market) value, ask them” (p. 41). However, as discussed above, the CRJs, CARP, the

Librarian and the appellate court consistently have stated that the relevant customers in the hypothetical market would be the CSOs, and that the Bortz survey is an appropriate methodology for assessing CSOs' relative valuations. Thus, the CRJs' 2004-05 determination stated "the Bortz survey focuses on the appropriate buyer in the hypothetical market—*i.e.*, the cable operator" (Federal Register, Vol. 75, September 17, 2010, p. 57066).

C. Were questions on the survey framed to be clear, precise and unbiased?

14. The criticisms that Dr. Steckel offers with respect to the constant sum questions are unfounded. As the Librarian has observed, "uncontroverted testimony and years of research indicate rather conclusively that constant sum methodology, as utilized in the Bortz survey, is highly predictive of actual marketplace behavior" (Federal Register, Vol. 69, January 26, 2004, p. 3615). The CRJs have likewise stated: "We find that the Bortz study is founded on a method—the constant sum survey—that has been long regarded as a recognized approach to market research. Tr. at 50 (Trautman), 1299 (Ringold), and 3007 (Gary Ford)" (Federal Register, Vol. 75, September 17, 2010, pp. 57066-67). These findings reflected substantial evidence presented by JSC and other parties regarding the suitability of constant sum questions for purposes of the Bortz survey.

15. For example, as Dr. Steckel notes (p. 34), Professor Leonard Reid presented detailed testimony explaining why constant sum questions were appropriate for the Bortz survey. Professor Reid explained that "[t]he constant sum scale is a widely accepted and often-used measurement tool in marketing research" and discussed a number of the underlying studies establishing the utility of that technique (August 1991 Testimony of

Leonard N. Reid (Reid Testimony) (JSC Written Direct Statement, Vol. II, Tab 14), pp. 5-14). As Professor Reid observed, “the constant sum technique is particularly well-suited for measuring behavioral intentions, past actions, and evaluative preferences” (Reid Testimony, p. 6). He further observed that “[t]he pragmatic value of the constant sum technique for measurement purposes may be demonstrated by its application in the field,” noting the routine use of this technique by leading marketing firms and major corporations (Reid Testimony, pp. 12-14).

16. While Dr. Steckel faults Dr. Reid for citing (among other studies) a seminal study by Dr. Joel Axelrod and suggests that Dr. Axelrod’s study weighs against the use of the constant sum technique for purposes of the Bortz survey (p. 35), he ignores (and perhaps was unaware) that Dr. Axelrod himself has testified in a prior cable royalty distribution proceeding that “the use of the constant sum technique in order to determine the relative values that cable operators attach to different types of programming is appropriate” and that nothing in his study suggests any issue with Bortz’s use of that technique (Oral Testimony of Joel N. Axelrod, Docket No. 94-3 CARP CD 1990-1992 (Axelrod Oral Testimony) (JSC Written Direct Statement, Vol. III, Tab 2), pp. 11130-34, 11249-50; February 1996 Rebuttal Testimony of Joel Axelrod (Axelrod Rebuttal Testimony) (JSC Written Direct Statement, Vol. II, Tab 2), pp. 2-4).

17. I agree with Dr. Steckel that the constant sum question might be difficult to answer if posed to respondents of a general population survey. But the respondents to the Bortz and Horowitz surveys are executives of cable system operations, who engage in complex business decisions as part of their professional lives. Dr. Steckel suggests that the task in the constant sum method requires executives to make judgments about

“unfamiliar constructs,” but program valuations are not unfamiliar constructs to cable system executives.⁵ As noted by Bortz, survey interviewers sought responses from the individual “most responsible for programming carriage decisions” (Bortz, pp. 14-15). The Written Rebuttal Testimony of Daniel Hartman (pp. 16-17) and Allan Singer (p. 11) confirm that the task of assessing relative value of programs is part of the job related to purchasing signals.

18. Dr. Steckel also fails to account for differences between the Bortz and Horowitz surveys with respect to the formulation of the questions. It is important to point out that in his critique of the Bortz methodology, Dr. Steckel reviewed the 2004-2005 data collection instrument and not the revised instrument used by Bortz for the 2010-2013 surveys. Presented below is the wording of the constant sum question used by Bortz in 2010-2013:

Now, I would like you to estimate the relative value to your cable system of each category of programming actually broadcast by the stations I mentioned during 2010, excluding any national network programming from ABC, CBS and NBC. Just as a reminder, we are only interested in U.S. commercial station(s) _____, U.S. non-commercial station(s) _____, and Canadian station(s) _____.... Assume your system spent a fixed dollar amount in 2010 to acquire all the non-network programming actually broadcast during 2010 by the stations I listed. What percentage, if any, of the fixed dollar amount would your system have spent for each category of programming? Please write down your estimates, and make sure they add to 100 percent.⁶

⁵ I note that this argument has been asserted previously. See October 1985 Testimony of Alan M. Rubin (p. 5) in which he states, “Operators and subscribers were asked to do something completely abnormal to their routine cable television behaviors.” Despite this criticism, previous CRJs have consistently looked to the Bortz survey with respect to their allocation decisions (see, for example, Federal Register, Vol. 75, September 17, 2010).

⁶ In response to comments expressed by the CRJs in their 2004-2005 Distribution Order, the wording used in 2010-2013 was modified from the wording used in 2004 and 2005 where, as in previous surveys, the Bortz constant sum question asked respondents to “assess the different programming categories in terms of their relative value in ‘attracting and retaining subscribers’” (Bortz, p. 40).

The wording used for the Horowitz surveys is as follows⁷:

Now, considering everything we have been discussing, I would like you to estimate the *relative value* to your cable system of each type of [NETWORK CARRYING SYSTEMS (E): *non-network*] programming actually broadcast during 2013 by [INSERT STATION(S) FROM LIST - COLUMN J].... Assume you had a fixed dollar amount to allocate for the [NETWORK CARRYING SYSTEMS (E): *non-network*] programming actually broadcast during 2013 on [INSERT STATION(S) FROM LIST - COLUMN J].... Considering the value of each type of programming to your cable system, what percentage, if any, of the fixed dollar amount would you allocate for each type of programming? Please write down your estimates and make sure they add to 100 percent.... In formulating your percentage, please think about all the factors we have been discussing, including using this programming in your advertising and promotions in 2013 to attract and retain customers, the importance of this programming to you and your subscribers, and any other considerations you may have.

As is evident from a comparison of the wording of these two constant sum questions, the Horowitz question asks the respondent to focus on valuations related to advertising and attracting and retaining customers, similar to the wording used in 2004-2005 by Bortz and criticized by the CRJs with respect to the 2004-2005 Distribution of Cable Royalty Funds. While the Horowitz question used in 2010-2013 does ask the respondent to “think about all factors,” the wording specifically calls out the issue of attracting and retaining customers. As noted by the CRJs in 2010, “a myriad of other net revenue considerations may be involved in any programming decisions” (Federal Register, Vol. 75, September 17, 2010, p. 57066).

19. A key requirement as outlined by Diamond is that questions be framed so as not to bias the respondents. As discussed in part IV below, the Horowitz questionnaire fails this condition, specifically in its use of examples for the Program Suppliers category.

⁷ Note that the wording reported here is not the wording used for PBS only or Canadian only stations. See Direct Testimony of Howard Horowitz (Horowitz), Appendix A, p. 36.

The examples used to describe the Program Suppliers category are misleading and biased in favor of Program Suppliers. See pages 16-18 below.

20. Dr. Steckel states that both the Bortz and Horowitz questions are “ambiguous” (p. 25) because the respondent is asked about a “system” (singular) when, in many cases, the respondent has responsibility for multiple cable systems. However, on this design issue, the Bortz and Horowitz surveys differ significantly. In the Bortz survey, if a single executive was responsible for more than one cable system, that executive completed a separate survey questionnaire for each system, focusing on a single cable system’s distant signals for each questionnaire (Written Rebuttal Testimony of James M. Trautman, p. 43, n. 29). In contrast, in the Horowitz survey, when a single executive was the respondent for more than one system, the executive “was only asked to respond to one survey for all the systems with the same channels” (Horowitz, p. 8), meaning that the respondent was tasked with addressing multiple cable systems in a single survey questionnaire. Hence, the criticism offered by Dr. Steckel on this point is only applicable to the Horowitz data collection effort.

21. I note that Dr. Steckel offers no empirical data to support his assertion that the constant sum questions are “complex” (p. 28).⁸ In my experience, when respondents are asked questions that they are not able to process cognitively due to the complexity of the question, the data reflect this in either high rates of missing data or illogical responses.

We see neither of these patterns in the Bortz data.

⁸ Program Suppliers’ experts have made the same assertion in prior proceedings; see for example the October 1985 Written Direct Testimony of Alan M. Rubin, and November 1991 Written Direct Testimony of Alan M. Rubin. Despite these previous concerns, the Program Suppliers adopted a constant sum methodology for the measurement of valuation in 2010-2013.

22. Finally, in his criticism of the constant sum methodology, Dr. Steckel notes several recent publications that outline new methodologies for collecting preference data. In contrast to the vast literature supporting the extensively used constant sum approach, Dr. Steckel is advocating for the adoption of techniques only recently introduced in the literature without significant testing and validation for the question of interest to the CRJs.

23. With respect to the Lourviere and Islam article cited by Dr. Steckel for the proposition that “indirect” measures of importance outperform direct measures, it is important to note that the authors also offer several cautions with respect to the use of “indirect” measures of which Dr. Steckel is advocating, including the susceptibility of these measures to context effects. Moreover, the authors never conclude that indirect measures outperform direct measures such as constant sum questions.

24. With respect to the other methodologies cited by Dr. Steckel (Netzer and Srinivasan, 2011 and Srinivasan and Wyner, 2009), these studies have only recently moved into the peer-reviewed literature, and both studies are based on web-based data collection (no interviewer) and focus on cases where there are a large number of attributes to assess (> 10). In contrast, the Bortz and Horowitz constant sum task focuses on only 5 to 8 program categories (depending upon the system) and were completed through live telephone interviews. One would be remiss to adopt the new approaches described in these articles based on the findings from a few recent studies.

D. What limitations are associated with the mode of data collection used in the survey?

25. Dr. Steckel claims that using the telephone for data collection results in unreliable and invalid data. Yet he does not provide any empirical support for that claim, and he

ignores that telephone surveys of business entities are widely used and recognized as producing reliable, valid data.⁹

26. As Dr. Axelrod testified in the 1990-1992 royalty proceedings, the use of telephone surveys is “an accepted survey research technique,” is “widely done,” and is appropriate for the purpose of administering the Bortz survey (see Axelrod Oral Testimony, pp. 11122, 11130-11134, 11223-25). The decision as to which mode of data collection to use is one that concerns tradeoffs between costs and potential errors. Each mode has its benefits and its limitations. Self-administered surveys such as those conducted via traditional mail or as web-based surveys benefit from allowing the respondent to read the material but are limited in that (1) one is never assured that the respondent fully reads any one question; (2) one cannot know with certainty who has served as the respondent; and (3) the lack of an interviewer forces the respondent to undertake the task by him/her self, with no means to seek clarification concerning a question or a response category. Interviewer-administered questions benefit from the presence of an interviewer—both to encourage overall response and to assist in the task—but the presence of an interviewer can also be detrimental in the measurement of socially desirable or undesirable behavior.

27. Indeed, the use of the telephone for the collection of survey data has been popular in the United States since the early 1970s and only recently has been in decline for general population surveys. However, for the Bortz and Horowitz surveys, we are not discussing general population surveys but rather a survey of business entities for which

⁹ I note that Alan Rubin in his Testimony of November, 1991 also asserted that the constant sum technique should only be used with “personal, face-to-face interviewing” (p. 7).

telephone surveys are quite prevalent. Moreover, to assist respondents at CSOs who carried only WGNA distant signals, the Bortz methodology used for the 2010-2013 data collection included advance mailing of materials identifying the compensable and non-compensable programming on WGNA. In contrast, the Horowitz survey did not provide such materials. As a result, no clear delineation of compensable and non-compensable programs was articulated for respondents to the Horowitz survey for whom WGNA was the only distant signal carried.

28. Dr. Steckel also criticizes the use of telephone surveys for data collection, citing a paper by Dr. Joel Axelrod as “caution[ing] against using constant sum measures in a telephone interview” (p. 35). However, in prior proceedings Dr. Axelrod himself appeared as a witness, discussed that same paper, and testified that the use of telephone surveys was appropriate for the purpose of administering the constant sum question in the Bortz survey (see Axelrod Oral Testimony, pp. 11130-11134).

29. I note that Dr. Steckel incorrectly asserts that the unit of analysis of the Bortz and Horowitz surveys is the cable system executive and not the cable system. He states: “The data are collected and tabulated with the unit of analysis being the respondent cable system executive, not the cable system” (p. 25). While the *respondent* in each of the surveys is an executive, the *analytic unit* for each of the surveys is the cable system, with weights corresponding to copyright royalties paid by the system. Based on his comments, it appears that Dr. Steckel has not examined the data from either the Bortz or Horowitz data collection efforts. Dr. Steckel is incorrect in his assertion that estimates from the studies are biased in favor of small cable operators.

30. In sum, I find the arguments put forth by Dr. Steckel to reiterate previous concerns expressed by experts for the Program Suppliers and which, in previous proceedings, have not been found to undermine either the methodology of or the estimates derived from the Bortz survey. I disagree with Dr. Steckel's assessment that the Bortz and Horowitz surveys focus on the wrong population to study; he asserts that the viewing public and not cable system executives should be the focus of study. Cable system executives *are* the relevant population to study for this task; in contrast to the viewing public, CSO executives are familiar with the concept of program valuations and utilize this information in contract negotiations. As such, there is no foundational support for Dr. Steckel's criticism that the constant sum question is "too complex."

IV. THE HOROWITZ SURVEY IS FUNDAMENTALLY FLAWED AND PROVIDES NEITHER A VALID NOR RELIABLE BASIS FOR ESTIMATING RELATIVE VALUE

31. The written direct testimony of Howard Horowitz summarizes the design and implementation of cable system operator surveys conducted by Horowitz Research for each of the years 2010-2013. The written direct testimony of Martin R. Frankel, Ph.D. provides information related to the sample design and estimation for the Horowitz surveys, 2010-2013.

32. The questionnaire and sample design of the Horowitz survey are similar in nature to those used by Bortz Media and Sports Group, Inc. Both surveys make use of a stratified random sample of Form 3 cable system operators, for which the strata are defined according to annual royalty amounts for the respective years. The mode of data collection is the same for the two studies—telephone—and the key question of interest, that is, program valuation, is based on a constant sum methodology. The survey questionnaire for both Bortz and Horowitz includes preliminary questions that measure

the respondent's perception of the importance of different types of program categories and introduces the respondent to the specific program categories of interest. The implementation of the two studies calls for both interviewers and respondents to be blinded to the respective sponsors of the data collection effort. And in the implementation of the two sets of studies, we see response rates that exceed the current norms in the industry.

33. However, there are significant differences in the two studies, and these differences are critical to understand in assessing the relative validity and reliability of the two sets of estimates for 2010-2013. The key design differences between the Bortz and Horowitz surveys include the following:

- The misuse of illustrative programming examples and “such as” programming descriptions—including the provision of incorrect examples, incorrect descriptions and programs that were not broadcast on a compensable basis;
- The failure to provide information identifying compensable programs on WGNA;
- The addition of an inappropriate “other sports programming” category;
- The consolidation of surveys in which a respondent was queried about multiple systems simultaneously; and
- The unnecessary burden of requiring respondents to consider *all* of the distant signals carried by a cable system.

A. Misuse of Illustrative Examples and “Such As” Descriptions

34. The Horowitz survey's relative value question (Question 6) violates general principles of questionnaire design due to its misleading and inconsistent use of examples and “such as” descriptions across program categories. As discussed in Diamond's “Reference Guide on Survey Research,” a fundamental requirement for a sound survey is that the questions must be “clear, precise and unbiased” (p. 387). Even an accurate example may inject bias into a survey question—for example by limiting respondents'

consideration to those examples that are offered (Beatty, Cosenza, and Fowler, 2006), or by increasing the reported frequency for the response category (Tourangeau, Conrad, Couper, and Ye, 2014). And where a survey question uses an inaccurate or misleading example, that renders the question (of which the example is part) inherently imprecise and biased. If examples are meant to serve as a means to improve comprehension of a question or a response category, then it is imperative that the examples not be misleading.

35. Of the problems with the Horowitz survey's relative value question, the inclusion of incorrect information as part of the response category descriptions is the most egregious. The rebuttal testimony of James Trautman lists in detail numerous errors in the program examples and "such as" program descriptions provided to the Horowitz survey respondents, both with respect to all of the WGNA-only systems and systems that included only WGNA and public broadcasting, as well as many of the other systems (Written Rebuttal Testimony of James M. Trautman, pp. 18-28). These errors include providing the cable system respondents with examples and descriptions of programming that the cable systems did not actually carry, or that was not compensable, or that was attributed to the incorrect program category. As a result of these inaccuracies, the questions are biased and therefore the responses are not valid representations of valuations for the various program categories.

36. In addition to these errors, I also note that the descriptions of program categories are inconsistent across the categories. As shown in Appendix A of Horowitz, no examples are offered with respect to the category "News and Community Events," whereas a similarly self-explanatory category "Movies" offers six examples in addition to three movie sub-categories offered as part of the "such as" clause. The examples offered

for the “Live, play-by-play coverage of professional and college team sports” are not examples but rather the full enumeration of the sports programs associated with this category. Sometimes a program category includes examples of sub-categories (through the use of “such as” descriptions) as well as specific program titles; for other program categories there are neither examples of sub-categories nor examples of specific program titles; and some program categories include only specific program examples.

37. These inconsistencies in the program category descriptions are significant. First, respondents give greater cognitive processing the longer the response category offered—so those categories that incorporate “such as” program subcategories and illustrative examples will benefit from greater cognitive processing by the respondent. The goal in designing response categories for a question is to minimize differences in the level of cognitive processing by the respondent across the various categories since differences in the level of processing may contribute to differences in responses. Second, frequency—or in this case, relative valuations—most likely are impacted by the use of examples. Thus, we would expect that valuations across categories could have differed, in part, as a result of the variation in language (“such as”) and variation in the use of illustrative examples. So as to minimize the measurement error attributed to question wording, each of the program categories should have been treated equally with respect to the number of illustrative examples and the use of “such as” language.

38. Although the inconsistencies in the structure of the program categories most likely impacts the estimation for these respective categories, it is the presentation of misleading information included in the description of program categories that results in my assessment that the questions (and response categories) are biased.

B. Failure to Identify Compensable WGNA Programming

39. Not only is the valuation question flawed due to what information is provided, the Horowitz questionnaire also suffers from errors of omission, specifically with respect to the identification of compensable programs for systems that carried WGNA. A key issue for signals that carry WGNA is for the respondent to understand which programs on WGNA are compensable and which are not. The Bortz surveys of WGNA-only systems addressed this issue by pre-mailing affected respondents a description of the compensable programs on WGNA every year, including the total number of hours of such programming (see Bortz, p. 30).

40. This feature of the Bortz surveys was new to the 2010-2013 data collection effort and addresses, in part, a concern raised by the CRJs as part of the distribution of the 2004-2005 cable royalty funds (Federal Register, Vol. 75, September 17, 2010, p. 57067).¹⁰ In contrast, the Horowitz survey merely instructed respondents with WGNA systems as follows: “Please do not assign any value to programs that are substituted for WGN’s blacked out programming” (Horowitz, Appendix A, p. 36). Cable system operators, however, have no reason to know which programs on WGNA are or are not substituted for blacked-out programming of the local WGN-Chicago station (see Written Rebuttal Testimony of James M. Trautman, pp. 14-15; Written Rebuttal Testimony of Allan Singer, p. 8).

41. Of particular importance is the fact that all of the non-compensable programming on WGNA falls within the Program Suppliers and Devotional categories (Written

¹⁰ I note that the list of compensable programs and hours of airtime were only sent to those systems for which WGNA was their only distant signal. Systems for which WGNA was one of two or more distant signals did not receive this information.

Rebuttal Testimony of James M. Trautman, p. 14). To the extent that the respondent does not fully understand and differentiate between compensable and non-compensable programs, the relative valuations for the Program Suppliers categories (movies, syndicated series, and “other” sports) as well as the Devotional category will be upwardly biased. Hence, I find that the methodology used by Bortz for WGNA-only (in which compensable programs were clearly delineated for the respondent) would lead me to conclude that for WGNA-only stations, the Bortz estimates would provide a more valid estimate of relative program valuations.¹¹

C. Addition of “Other Sports Programming” Category

42. Another key difference between the Bortz and Horowitz surveys is the inclusion of an “Other sports” program category in the Horowitz survey. Treating a category as minor as “other sports” in the same manner as program categories such as “movies” and “live professional and college sports” suggests to the respondent that the category is significant and on par with the other seven categories. I agree with Mr. Trautman’s assessment that the provision of these misleading examples would lead to inflated estimates of the relative value of “other sports.” For example, if we look at those systems that retransmitted WGNA as their only commercial distant signal during 2010-2013, we see responses in the Horowitz data that are illogical, given the fact that WGNA carried less than two hours each year of compensable “Other Sports” (Trautman Written Rebuttal Testimony, p. 17). For example, in 2013, one of the responding CSOs assigned relative

¹¹ I note that for those cable systems for which WGNA is one of two or more distant signals carried, neither Bortz nor Horowitz provided respondents with a list of compensable programs. For those “WGNA-plus” systems, the Bortz surveys provide a more valid estimate of relative program valuations than the Horowitz surveys due to the flaws in the Horowitz WGNA-plus surveys discussed herein, such as the use of misleading and inaccurate program examples and the inappropriate addition of an “Other Sports” category.

valuations of ‘25’ for both Live Team Sports and “Other Sports.” Other examples include three responding CSOs that each valued Live Team Sports at ‘40’ and “Other Sports” at ‘30’ despite the fact that the only compensable “Other Sport” broadcast was a single one-hour horse race (“The Arlington Million”) (Trautman Written Rebuttal Testimony, p. 17).

D. Respondent Selection

43. The Bortz and Horowitz data collection methodologies differed in their approach to identifying the respondent of interest and how interviews were conducted. For the Bortz study, interviewers sought to interview the individual “most responsible for programming carriage decisions” (Bortz, pp. 14-15). As noted by Bortz, “In attempting to reach this individual, the interviewer was frequently referred to a regional executive” (p. 15). As such, Bortz often began at the CSO level to identify the person responsible for programming and moved up to a regional executive when necessary. The Bortz approach of starting at the CSO level limited the number of cable systems for which a single executive served as a respondent to a maximum of eleven, with the average number of CSOs for which a respondent reported ranging between 2 (2011) and 2.4 (2010) and the modal number of responses being 1 (that is, most respondents only responded for one system) (Trautman Written Rebuttal Testimony, Table A-4).

Moreover, when the same individual was selected to report on multiple cable systems, he or she was administered a separate questionnaire for each system so as to focus solely on a single cable system at a time.

44. The Horowitz survey methodology also calls for the selection of “the executive with the decision-making authority over the carriage of distant broadcast signals for each CSO in our sample” (Horowitz, p. 5). However, in contrast to the approach used by

Bortz, the methodology used by Horowitz begins at the top of the decision making process, often at the MSO level. As a result, some respondents had significant response burden, being asked to report on an extremely large number of cable systems. For example, we see that in 2013 the AT&T MSO includes 60 CSOs in the universe of systems surveyed by Horowitz, and that a single executive was interviewed with respect to all 60 CSOs (Horowitz, Appendix B, p. 41). Focusing on the Horowitz sample systems, the number of cable systems for which a single executive provided data was as high as 38 (in 2013).¹² Also in contrast to the Bortz methodology, in the Horowitz survey, when a single executive was responsible for multiple systems and each of those systems had the same distant channel lineup, then only a single survey was administered. (Horowitz, p. 8).

45. For these reasons, the Horowitz methodology places excessive burden on the selected respondent. For the Horowitz survey, an executive was asked to report not only about those cable systems selected for the sample, but also for all systems for which he or she was responsible in the *entire universe* of Form 3 cable systems that transmitted a distant signal (Horowitz, p. 8). As a result, you see the extremely high number of cable systems for which an individual had to respond evident in the tables of Appendix B of the Horowitz report. Rather than focus on those CSOs that form the basis for the estimation, a respondent had to evaluate a much larger set of CSOs to determine his or her program relative valuations. The task as posed in the Horowitz survey (asking a single individual respondent about many CSOs either in a single interview or across multiple interviews

¹² JSC_2010_2013_Masked_withDistantStations_MSChanges_13July2017.xlsx.

for those cases with different distant signals) would lead respondents to make summary judgments concerning valuations.

46. These summary judgments, in the case of multiple CSOs with the same distant signal, will reflect valuations for *sampled* CSOs as well as *non-sampled* CSOs since Horowitz asked respondents to report on the universe of all CSOs.

47. The pooling of multiple CSOs with the same distant signal lineup into a single questionnaire assumes that the valuation for those distant signals is the same, regardless of the population being served by those distant signals. Consider, for example, the case of WGNA, a distant signal that is transmitted throughout the country. One can imagine that interest in the Chicago sports teams or Chicago-related news may be greater in some parts of the country than others. To group all of the WGNA systems together in requesting relative program valuations makes an assumption about the equality of valuations for every cable system that offers WGNA (among those reported for by the same respondent). Addressing multiple systems in a single survey meant the respondents had to somehow provide a single valuation for signals carried across a large number of systems that were likely geographically diverse.

48. In addition to the burden related to reporting for multiple CSOs in a single interview, the Horowitz survey differs from the Bortz methodology in that executives were queried about *all* distant signals transmitted by each of the cable systems. Based on the data provided by Horowitz, the number of distant signals associated with any one cable system ranged from one to over fifty; respondents would have been queried about all of the distant signals transmitted by their respective cable system. In contrast, Bortz

limited the number of distant signals for which a respondent had to report to eight (Bortz, p. 33-36).

49. As a result of their data collection approach, the Horowitz data are populated by a relatively small number of respondents. Table 1 shows the number of CSOs, the number of respondents, and the concentration of CSO responses for the Horowitz data. See also Trautman Written Rebuttal Testimony, Table A-4.

Table 1. Number of CSOs, Respondents, and Measures of Respondent Concentration, by Year, Horowitz Data

Year	Number of CSOs for which there are sample data	Number of respondents providing data for the CSOs in Column 2	Number of respondents reporting for 10+ CSOs	Percentage of data accounted for by the respondents in Column 4	Percent of data accounted for by the top 2 respondents
2010	123	31	3	42.4%	32.6%
2011	182	43	4	37.8%	25.2%
2012	228	42	8	58.9%	26.8%
2013	200	41	7	62.0%	29.0%

Source: Trautman Written Rebuttal Testimony, Table A-4.

As is evident from the table, especially for 2012 and 2013, a small number of individuals account for a large percentage of the data. And, as is evident from the final column of Table 1, in each year, two respondents account for more than a quarter of the data. The concentration of data exhibited in Table 1 is detrimental for two reasons: (1) the observations in the data are clearly not independent and should not be treated as such in the calculation of means and standard errors; and (2) with only two respondents accounting for over 25% of the data each year, these individuals can have an undue influence on the final estimates.

50. According to the methodology described by Horowitz (p. 8), when cable systems offered the same mix of distant signals, executives were to be interviewed once

concerning all of the similar CSOs. However, when I examine the data for a single respondent in a given year, I also find identical program valuations across CSOs with *varying* distant signals. For example, in 2013, looking only at the *sample* data used in estimation, respondent 54 (as identified in the Program Suppliers' data) provided information on 38 different cable systems.¹³ For 15 of these 38 cable systems, the program valuations were as follows:

- News: 0% valuation
- Syndicated Series: 30%
- Movies: 15%
- Live Sports: 5%
- Other Sports: 0%
- Devotional: 0%
- Public Television (PTV): 50%
- Canadian: No valuation

However, the distant signals carried by these 15 cable systems varies, with no two cable systems offering the same mix of distant signals. It is quite surprising that this executive produced the *exact same valuations* for each of these 15 cable systems carrying different line-ups—assuming that he or she was interviewed separately about each system. Nor is this an isolated example; I see the same pattern of identical valuations for executives required to report for multiple cable systems across all four years of data.¹⁴ These repeated identical responses regarding systems with non-identical signal lineups raise questions as to whether the survey protocol for separate questionnaires was in fact

¹³ JSC_2010_2013_Masked_withDistantStations_MSOchanges_13July2017.xlsx.

¹⁴ The example provided above is with respect to the repetition seen among those cases identified as part of the Horowitz sample (used for estimation by Dr. Frankel). The pattern of identical reporting across cable systems is even more evident when one looks at the full universe of systems for which a single executive was asked to report.

correctly implemented—or whether some respondents employed “short-cuts” in response to the burden of being asked to respond for numerous systems.

E. Summary of Horowitz Survey’s Design Problems

51. The survey as designed and implemented by Dr. Horowitz and which forms the basis of the estimates provided by Dr. Frankel is fraught with problems. These problems include, but are not limited to:

- The extensive use of misleading and incorrect examples in the program category descriptions as well as the inconsistent use of the “such as” program examples;
- The failure to provide information identifying compensable programs on WGNA;
- The addition of an inappropriate “other sports programming” category;
- The consolidation of surveys in which a respondent was queried about multiple systems simultaneously; and
- The implementation of a data collection methodology that was excessively burdensome in that it requested respondents to report not only on sampled cable systems but all cable systems as well as reporting for *all* distant signals associated with each of the cable systems.

The extent of the misinformation provided as examples or as subcategories of programs (“such as”) in the program category descriptions and the inconsistent use of examples and subcategories raises serious questions as to the validity of the responses and resulting estimates of program category valuations. Diamond (2011) notes that “[w]hen unclear questions are included in a survey, they may threaten the validity of the survey by systematically distorting responses if respondents are misled in a particular direction, or by inflating random error if respondents guess because they do not understand the

question” (p. 388). In this case, I believe that the provision of misinformation (exacerbated by the failure to provide information related to compensable programming) is sufficiently egregious as to reject the estimates of relative valuations resulting from the Horowitz survey. As a result of the issues I have outlined above, the Horowitz data provide neither a valid or reliable basis on which to estimate program valuations.

F. Data Adjustments

52. For those cable systems for which PBS was the only distant signal, the Horowitz questionnaire asks the following: “Considering the value of the programs broadcast only on PBS station (INSERT PBS STATIONS) to your cable system, what percentage, if any, of the fixed dollar amount would you allocate for this type of programming” (Horowitz, Appendix A, p. 36). PBS-only cable system executives were not instructed that the value of their estimate needed to add to 100%.

53. The question, as posed, is confusing, because how is an executive to value a program category relative to other categories if the cable system only offers programming in a single category, in this case, PBS? Regardless, the questionnaire does allow respondents to provide answers less than 100%. Such answers are clearly evident in the Horowitz survey responses. There are several¹⁵ cases for which PTV-only systems reported valuations less than 100% for the PTV category. For example, in 2012, the relative program valuations for the 20 PTV-only systems range from 2% to 75%. However, it appears that Dr. Frankel adjusted these values to equal 100% (see, for

¹⁵ See JSC_2010_2013_Masked_withDistantStations_MSOchanges_13July2017.xlsx. In 2010, 3 of the 15 (20%) of the PTV-only cable systems had valuations less than 100%; in 2011, 28 of the 28 (100%) of the PTV-only cable system had valuations less than 100%; in 2012, 20 of the 20 (100%) PTV-only cable systems had valuations less than 100%; and in 2013, 20 of the 20 (100%) of the PTV-only stations had valuations less than 100%.

example, the “reproportion” line of code in MPAA_2012.f90). Dr. Frankel provides no justification for altering the reported valuation.

G. Comparison of Statistical Estimates

54. The CRJs have in prior distribution orders cited the importance of focusing on confidence intervals around an estimate as opposed to strict adherence to the point estimates (Federal Register, Vol. 75, September 17, 2010, pp. 57066, 57068). Table IV-2 of the Bortz report provides 95% confidence intervals for the seven program categories used in the Bortz survey.

55. Dr. Frankel in his written direct testimony provides standard errors for the estimates derived from the Horowitz survey, rather than 95% confidence intervals. In order to provide an apples-to-apples comparison of the two sets of estimates, I have set forth below the point estimates, the margin of error¹⁶, and the 95% confidence intervals for the Horowitz-based surveys, along with the 95% confidence intervals produced in Table IV-2 of the Bortz report.

¹⁶ Margin of error = standard error of the estimate x 1.96, where 1.96 is the value corresponding to an alpha level of .05, that is, a 95% confidence level.

Table 2. Point Estimates, Margin of Error and 95% Confidence Intervals for Distant Signal Programming Valuation, by Programming Type, Survey Organization, and Year (95% confidence interval in parentheses)

	Bortz	Horowitz
2010		
Live professional and college team sports	40.9% \pm 1.6% (39.3% - 42.5%)	31.9 \pm 4.25 (27.7% - 36.2%)
Other sports	N/A	6.8% \pm 1.3% (5.5% - 8.0%)
News and public affairs	18.7% \pm 1.2% (17.5% - 19.9%)	12.4% \pm 2.9% (9.5% - 15.3%)
Movies	15.9% \pm 0.7% (15.2%-16.6%)	17.2% \pm 2.3% (14.9% - 19.4%)
Syndicated shows, series and specials	16.0% \pm 1.0% (15.0%-16.9%)	20.3% \pm 3.3% (16.9% - 23.6%)
PBS and all other programming on non-commercial signals	4.4% \pm 0.9% (3.6%-5.3%)	7.7% \pm 3.3% (4.4% - 11.0%)
Devotional and religious programming	4.0% \pm 0.4% (3.6% \pm 4.4%)	3.8% \pm 1.5% (2.3% - 5.3%)
All programming on Canadian signals	0.1% \pm 0.1% (0.0% - 0.2%)	0.0% \pm 0.0% (0.0% - 0.0%)
2011		
Live professional and college team sports	36.4% \pm 1.4% (34.9% - 37.8%)	27.1% \pm 3.0% (24.1% - 30.1%)
Other sports	N/A	10.8% \pm 1.6% (9.3% - 12.3%)
News and public affairs	18.3% \pm 1.2% (17.1% - 19.6%)	12.9% \pm 2.0% (10.9% - 14.8%)
Movies	18.6% \pm 0.9% (17.7% - 19.5%)	11.4% \pm 1.6% (9.9% - 13.0%)
Syndicated shows, series and specials	17.4% \pm 1.0% (16.3% - 18.4%)	17.6% \pm 2.1% (15.5% - 19.7%)
PBS and all other programming on non-commercial signals	4.7% \pm 0.9% (3.9% - 5.6%)	13.3% \pm 3.3% (10.1% - 16.6%)
Devotional and religious programming	4.5% \pm 0.4% (4.1% - 4.9%)	5.9% \pm 1.3% (4.6% - 7.2%)
All programming on Canadian signals	0.2% \pm 0.1% (0.0% - 0.3%)	1.0% \pm 1.7% (0.0% - 2.7%)

2012		
Live professional and college team sports	37.9% ± 1.8% (36.1% - 39.7%)	25.5% ± 2.9% (22.6% - 28.4%)
Other sports	N/A	9.0% ± 1.3% (7.7% - 10.3%)
News and public affairs	22.8% ± 1.0% (21.8% - 23.8%)	15.7% ± 1.7% (14.0% - 17.4%)
Movies	15.3% ± 0.8% (14.5% - 16.1%)	12.1% ± 1.4% (10.7% - 13.6%)
Syndicated shows, series and specials	13.5% ± 0.6% (12.9% - 14.1%)	16.0% ± 2.0% (14.0% - 18.0%)
PBS and all other programming on non-commercial signals	5.1% ± 0.8% (4.3% - 5.9%)	15.1% ± 3.6% 11.5% - 18.6%
Devotional and religious programming	4.8% ± 0.4% (4.4% - 5.2%)	5.7% ± 0.8% (5.0% - 6.5%)
All programming on Canadian signals	0.6% ± 0.6% (0.1% - 1.2%)	0.9% ± 0.7% (0.2% - 1.6%)
2013		
Live professional and college team sports	37.7% ± 1.2% (36.4% - 38.9%)	35.3% ± 9.5% (25.8% - 44.8%)
Other sports	N/A	7.4% ± 1.5% (5.9% - 8.9%)
News and public affairs	22.7% ± 1.0% (21.7% - 23.6%)	9.5% ± 2.0% (7.6% - 11.5%)
Movies	15.5% ± 0.8% (14.7% - 16.2%)	12.4% ± 2.5% (9.9% - 14.9%)
Syndicated shows, series and specials	11.8% ± 0.7% (11.0% - 12.5%)	16.3% ± 3.1% (13.1% - 19.4%)
PBS and all other programming on non-commercial signals	6.2% ± 0.8% (5.4% - 7.0%)	15.4% ± 6.6% (8.8% - 22.0%)
Devotional and religious programming	5.1% ± 0.3% (4.8% - 5.4%)	3.5% ± 0.9% (2.6% - 4.3%)
All programming on Canadian signals	1.2% ± 0.9% (0.4% - 2.1%)	0.4% ± 0.3% (0.1% - 0.6%)

Note: Data sources for Table 2 include Direct Testimony of Martin R. Frankel, Tables 5-8 (pp. 8 and 9) for the Horowitz column and Tables IV-1 (p. 42), IV-2 (p. 44), and Appendix D (pp. D-8 through D-11) for the Bortz column. Computation of margin of error and the 95% confidence interval for the Horowitz data computed by N. Mathiowetz based on the standard errors presented by Dr. Frankel. All estimates rounded to one significant digit. In 2010, the Horowitz estimate for all programming on Canadian Signals was 0.01% which rounds to 0.0% as presented in this table.

56. Looking only at the data for 2013 (for illustrative purposes), we see significant differences in the valuations for news and public affairs, syndicated shows, series, and specials, PTV, and devotional programming. The wider confidence intervals seen in the Horowitz-produced data renders several of the comparisons non-significant. For example, looking at live professional and college team sports for 2013, the 95% confidence interval produced from the Bortz data is 36.4% to 38.9%—a spread of ± 1.2 percentage points—whereas the interval produced from the Horowitz data is 25.8% to 44.8%—a spread of ± 9.5 percentage points.

V. THE FORD/RINGOLD SURVEY DOES NOT PROVIDE A RELIABLE BASIS FOR ALLOCATING RELATIVE VALUE TO CANADIAN PROGRAMMING

57. The written direct testimony of Debra J. Ringold summarizes the methodology and estimates resulting from the Ford/Ringold survey of U.S. cable system operators who retransmitted Canadian television stations as distant signals in 2010 through 2013. The Ford/Ringold survey design is similar to that used by Bortz and Horowitz in which a sample of cable system operators are interviewed about the relative value the operator would assign to categories of programs using a constant sum methodology. However, there are significant differences with respect to the sample design and the precision of the estimates between the Ford/Ringold survey and the Bortz survey.

58. The Ford/Ringold design indicates that CSOs were interviewed about “one Canadian signal randomly chosen from those Canadian signals retransmitted” (CCG-6, p. 4) but no information is provided as to how the signal was selected. It appears that the sample design of for the Ford/Ringold survey gave preference to French-language signals (“If cable systems were found to retransmit both an English-language and French-

language Canadian signal, the system was interviewed with the French-language version of the questionnaire, due to the smaller number of French-language systems” CCG-6, p. 6). As a result of this preference, the resulting analytic sample over-represents French-language systems. Whereas French-language stations accounted for about 21% of distant subscriber instances in 2013 (see CCG-1, Table 1 and Table 2, pp. 2-3, 5), the composition of the Ford/Ringold analytic sample consists of between 36% to 55% French-Language systems (computation based on data provided in CCG-6, Table 5 and CCG-6, Table 6).¹⁷

59. Diamond (2011) asks, “Does the sample approximate the relevant characteristics of the population?” In the case of the Ford/Ringold sample design, the analytic sample clearly over-represents a segment of the population, that is the French-language stations.

60. Diamond (2011) also notes that “all sample surveys produce estimates of population values, not exact measures of those values” (p. 381). One factor that affects the margin of error around a survey estimate is the size of the analytic sample. In the case of the study completed by Drs. Ford and Ringold, the sample sizes are extremely small, leading to large 95% confidence intervals for those estimates. Listed below are the estimates for the average value of the programming reported by Drs. Ford and Ringold in Table 1 (CCG-6, p. 15) for the “live professional and college team sports” category. Table 3 includes my computation of the standard errors as well as the 95% confidence interval of the estimates, under the assumption of a simple random sample.

¹⁷ Specifically for 2010-2013, the proportion of French-Language Canadian Signals in the Ford/Ringold analytic sample is 38% (8 of 21), 44% (8 of 18), 36% (5 of 14) and 55% (6 of 11), respectively.

Table 3. Average Value of Live Professional and College Team Sports Shown on Canadian Signals with Standard Errors and 95% Confidence Intervals

Year	Estimate produced by Drs. Ford and Ringold (Table 1) (Sample size in parentheses)	Standard Deviation produced by Drs. Ford and Ringold (Table 1)	Standard Error of the Estimate	95% Confidence Interval (based on the standard error of the estimate)
2010	26.67 (21)	18.05	3.94	18.45 to 34.88
2011	14.72** (18)	9.92**	2.35**	10.14 to 19.30**
2012	21.07 (14)	21.23	5.67	8.81 to 33.33
2013	20.91 (11)	17.72	5.34	9.01 to 32.83

** My analysis of the Ford/Ringold data indicates that for 2011, the average value of live professional and college team sports is 15.52 with a standard deviation of 10.26, a standard error of 2.34 and a 95% confidence interval of 10.58 to 20.47

61. Two points of interest. First, Drs. Ford and Ringold produced standard deviations of the estimates, not standard errors. A standard deviation measures the dispersion of a set of data whereas a standard error is a measure of the reliability of an estimate. The two measures are related in that the standard error of an estimate is equal to the standard deviation of the estimate divided by the square root of the sample size. The 95% confidence interval, as described by Diamond (2011) “means that if 100 samples of the same size were drawn, the confidence interval expected for at least 95 of the samples would be expected to include the true population value” (p. 381). It does not mean that one is 95% confident that the true population value falls within the range provided.

Second, in contrast to the Bortz survey, we see that the small sample size for the

Ford/Ringold survey leads to highly unreliable estimates (that is, wide confidence intervals).

62. The over-representation of French-speaking channels, coupled with the unreliable estimates, render the data from the Ford/Ringold study to be of little to no utility with respect to the issue of relative market value of Canadian programming on Canadian distant signals retransmitted by cable system operators in the United States.

63. Beyond the problems outlined above, a secondary issue with respect to the report of Drs. Ford and Ringold is the production of importance estimates for programming on TBS, U.S. superstations, and U.S. independent stations. Drs. Ford and Ringold note that the assessment of the relative importance of programming on these stations was conducted “to reduce the chances that respondents would guess the survey purpose or sponsor” (CCG-6, p. 4). Although I am supportive of the goal of masking the survey’s purpose and sponsorship to respondents, the introduction of program categories that differ from those related to the primary purpose of the study adds unnecessarily to the cognitive burden of the respondents. Rather than simply reporting on the one constant sum question of interest before the CRJs, respondents to the Ford/Ringold survey were queried with respect to (up to) three different sets of program categories. This additional burden was unnecessary and may have led to confusion on the part of the respondents when reporting on the key question of interest, the relative programming value for Signal B stations.

64. Grouping together superstations such as WGN and WPIX with the cable network TBS likely led to additional confusion. Apart from the fact that TBS is not a distant signal, several of the program categories included in the constant sum question for

Signal A cable systems are irrelevant to TBS (news, children's programming, and devotional categories). Asking respondents to report on the relative value of programming that is not even offered would most likely further confuse respondents.

According to the data produced by Drs. Ford and Ringold, of the 42 times that respondents were queried about a "superstation," 68.9% of the respondents were answering the questions with respect to TBS.

65. Similar to the estimates for the Canadian distant signals, the estimates for superstations (Table 2, CCG-6, p. 16) and independent stations (Table 3, CCG-6, p. 17) are based on very small sample sizes and are therefore subject to wide confidence intervals (unreliable estimates). Table 4 provides the standard errors and 95% confidence intervals for the live professional and college team sports based on the means and standard deviations produced by Drs. Ford and Ringold.

Table 4. Average Value of Live Professional and College Team Sports Shown on “superstations” and independent stations with Standard Errors and 95% Confidence Intervals

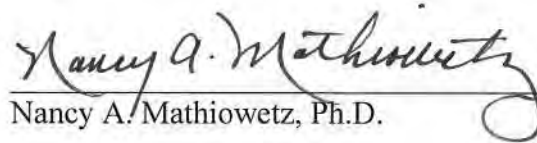
Year	Estimate produced by Drs. Ford and Ringold (Table 2 or 3) (Sample size in parentheses)	Standard Deviation produced by Drs. Ford and Ringold (Table 2 or 3)	Standard Error of the Estimate	95% Confidence Interval (based on the standard error of the estimate)
Superstation Estimates				
2010	35.00 (19)	20.75	4.76	25.67 to 44.33
2011	26.76 (17)	11.58	2.81	21.26 to 32.26
2012	19.64 (14)	12.32	3.29	13.19 to 26.09
2013	23.50 (10)	16.17	5.11	13.48 to 33.52
Independent Estimates				
2010	16.25 (4)	17.97	8.99	-1.37 to 33.87
2011	25.00 (5)	16.58	7.41	10.47 to 39.53
2012	24.00 (5)	4.18	1.87	20.33 to 27.66
2013	31.67 (3)	14.43	8.33	15.34 to 48.00

Note: Standard errors and confidence intervals produced for comparison purposes only. It is my usual practice to not produce estimates or confidence intervals when the number of observations within a cell is below n=20.

Similar to the estimates of Canadian distant signals, the unreliability of the estimates renders them uninformative with respect to understanding program valuations for superstations and independent stations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on __ September 14, 2017.


Nancy A. Mathiowetz, Ph.D.

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IN THE MATTER OF:)

) Docket No.

DETERMINATION OF CABLE) 14-CRB-0010-CD

ROYALTY FUNDS) (2010-2013)

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4 IN THE MATTER OF:)

5) Docket No.

6 DETERMINATION OF CABLE) 14-CRB-0010-CD

7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

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20 VOLUME III

21

22

23 Reported by: Joe W. Strickland, RPR, CRR, CRC
24 Karen Brynteson, RMR, CRR, FAPR

25

1 will do everything in our power to give you a
2 ruling first thing in the morning or at some
3 time early tomorrow so that you can tip off
4 your witnesses for Thursday.

5 MR. GARRETT: Thank you, Your Honor.

6 JUDGE BARNETT: Thank you.

7 MR. OLANIRAN: Thank you, Your Honor.

8 JUDGE BARNETT: And, Mr. Laane, are
9 you calling the next witness?

10 MR. LAANE: I am, Your Honor. Joint
11 Sports Claimants call Dr. Nancy Mathiowetz.

12 JUDGE BARNETT: Be careful. We're
13 using this desk for witnesses. Please raise
14 your right hand.
15 Whereupon--

16 NANCY MATHIOWETZ,
17 having been first duly sworn, was examined and
18 testified as follows:

19 JUDGE BARNETT: Please be seated.

20 DIRECT EXAMINATION

21 BY MR. LAANE:

22 Q. Good afternoon, Dr. Mathiowetz.
23 Please introduce yourself to the Judges.

24 A. Good afternoon. My name is Nancy
25 Mathiowetz.

1 Q. And what do you do, professionally?

2 A. Currently, I'm professor emerita from
3 the University of Wisconsin, Milwaukee.

4 Q. Could you --

5 JUDGE BARNETT: Just to -- I'm sorry,
6 could you spell your last name for the record.

7 THE WITNESS: Sure,
8 M-a-t-h-i-o-w-e-t-z.

9 JUDGE BARNETT: Thank you.

10 BY MR. LAANE:

11 Q. And could you just give us an
12 overview, please, of your educational
13 background.

14 A. Yes. I hold a Bachelor's degree from
15 the University of Wisconsin, a Master's degree
16 in biostatistics, and a Ph.D. in sociology.
17 The two graduate degrees are both from the
18 University of Michigan.

19 Q. Okay. And what was the focus of your
20 Ph.D. work?

21 A. The focus of my Ph.D. work was mainly
22 in survey methodology.

23 Q. And what did you do before taking your
24 emerita status?

25 A. So for the past 25 to 30 years, I've

1 been a faculty member, most recently at the
2 University of Wisconsin Milwaukee, and prior to
3 that at the Joint Program in Survey
4 Methodology, which was a program of the
5 University of Michigan and the University of
6 Maryland.

7 Q. And what courses did you teach in
8 those academic positions?

9 A. So in those academic positions, I
10 taught graduate courses in statistics,
11 questionnaire design, survey research, and
12 general research methods.

13 Q. Okay. And in your current status, do
14 you continue to teach courses in survey
15 methodology?

16 A. I do.

17 Q. And how about research? What has the
18 focus of your research been over the years?

19 A. So, broadly speaking, my research has
20 been in survey methods. More narrowly, I focus
21 on issues related to questionnaire design.

22 Q. And have you published your research
23 in peer-reviewed journals?

24 A. I have. Over, oh my gosh, now 45 some
25 years maybe or 40 years, in journals like

1 Public Opinion Quarterly, the Journal of
2 Business and Economic Statistics, and I also
3 publish in substantive journals, typically in
4 areas of health like the American Journal of
5 the Public Health Association.

6 Q. Have you also been asked by journals
7 to serve as a peer-reviewer of other scholars'
8 works to see if they are worthy of publication?

9 A. Yes, I have.

10 Q. And can you just give us a couple
11 examples of journals that have asked you to do
12 that?

13 A. The same journals I have published in,
14 as well as a broad range of other statistical
15 and substantive journals like the Journal of
16 Gerontology, the Journal of the American
17 Statistical Association, to name a couple.

18 Q. And I noticed on your CV, it said that
19 you were a reviewer for the Federal Judicial
20 Center's first edition of their reference
21 manual on scientific evidence.

22 What is that?

23 A. So that manual was put together by the
24 Federal Judicial Center as a guide, as I
25 understand it, for judges to be able to have a

1 guide for technical issues brought before the
2 court. So there are various chapters in there,
3 some dealing with statistics, and there is one
4 particular chapter dealing with survey
5 research, for which I was a reviewer.

6 Q. Have you served as an editor for any
7 journals in the fields of survey methodology or
8 statistics?

9 A. I have. So I have been co-editor in
10 chief of Public Opinion Quarterly, which is one
11 of two peer-reviewed journals from the American
12 Association for Public Opinion Research.

13 In addition, I have also served as the
14 associate editor for the Journal of Official
15 Statistics.

16 Q. You mentioned the American Association
17 for Public Opinion Research. Is that also
18 referred to as AAPOR?

19 A. It is.

20 Q. And what is AAPOR?

21 A. AAPOR is a professional organization.
22 It's composed of academics, people who work in
23 survey research in the federal government, as
24 well as practitioners in the private sector.

25 Q. And have you held any leadership

1 positions in AAPOR?

2 A. I have. So I was honored to serve as
3 the president of AAPOR between 2007 to 2008.
4 Prior to that, I was secretary/treasurer. I
5 also served as standards chair and as well as
6 chair of the Membership Committee.

7 Q. And have you received any honors or
8 awards from AAPOR?

9 A. I have. In 2015, I actually received
10 AAPOR's highest award. It's an award entitled
11 the AAPOR Award For Exceptional Distinguished
12 Achievement.

13 Q. Are you a fellow of the American
14 Statistical Association?

15 A. I am.

16 Q. What is the American Statistical
17 Association?

18 A. So like AAPOR, it is a professional
19 organization composed of people who practice in
20 statistics across academics, private sector,
21 and government, and it is the American version
22 of that. There's also an international
23 version.

24 Q. And how does one become a fellow of
25 the American Statistical Association?

1 A. Fellows are nominated and elected by
2 peers in the organization.

3 Q. Now, before becoming a university
4 professor, did you work for the federal
5 government?

6 A. I did. I actually used to live here
7 in Washington, was -- worked for various
8 departments in the Health and Human Services
9 and also spent time at the U.S. Bureau of the
10 Census.

11 Q. And was that work on survey research?

12 A. Yes, all related to issues in survey
13 research and statistics.

14 Q. And since going into academics, have
15 you been retained by any government agencies to
16 consult with them on survey research
17 methodology?

18 A. So since moving to academics, I have
19 served both as a consultant and on technical
20 advisory panels for various federal agencies,
21 including the Bureau of Labor Statistics, the
22 Energy Information Agency, the U.S. Census
23 Bureau, as well as for the National Institutes
24 of Health and the National Science Foundation.

25 Q. And have you testified in court as an

1 expert on survey research?

2 A. I have.

3 Q. Okay. And would that include any
4 testimony for the federal government?

5 A. I have testified on behalf of the
6 Federal Trade Commission and am currently
7 retained for the Federal Trade Commission in a
8 case.

9 MR. LAANE: Your Honor, the Joint
10 Sports Claimants offer Dr. Mathiowetz as an
11 expert on survey research methodology,
12 questionnaire design, and statistics.

13 JUDGE BARNETT: Hearing no objection
14 -- oh, Mr. Olaniran?

15 MR. OLANIRAN: I just have a couple
16 questions for voir dire.

17 JUDGE BARNETT: You may.

18 VOIR DIRE EXAMINATION

19 BY MR. OLANIRAN:

20 Q. Good afternoon, Dr. Mathiowetz. I'm
21 Greg Olaniran for Program Suppliers.

22 A. Good afternoon.

23 Q. You've conducted surveys on your own,
24 have you not?

25 A. Yes.

1 Q. Okay. And --

2 A. Well, let's just be perfectly clear
3 with language.

4 Q. Sure.

5 A. Conducted?

6 Q. Yes.

7 A. I've designed surveys. I don't go out
8 and interview the thousands of people who are
9 administered that survey.

10 Q. That's actually what I was getting at.
11 You've designed survey questionnaires by
12 yourself, correct?

13 A. Certainly, I've designed surveys by
14 myself, but most of the time I'm working with a
15 team for the design and execution of surveys.

16 Q. I understand. And on average, over
17 the last ten years, how many surveys have you
18 designed on average each year?

19 A. That's not a metric that I would hold
20 in my head, so thinking about the last year,
21 I've been involved in the design of at least
22 two dozen different surveys.

23 Q. And is that the typical average over
24 the last ten years, you would say or no?

25 A. There -- there is no typical average

1 in my life. Some years I'm working on one
2 large survey that may take, you know, six
3 months to a year, and other years I'm working
4 on much shorter surveys.

5 Q. Okay. Have you conducted any surveys
6 regarding television programming?

7 A. No, I have not.

8 Q. Okay. And do you make a distinction
9 between cable network programming versus
10 broadcast television programming?

11 MR. LAANE: Your Honor, this is going
12 beyond qualifications.

13 JUDGE BARNETT: Sustained. That --
14 she's not here to testify about --

15 MR. OLANIRAN: I just wanted to make
16 sure that she wasn't -- I know that some
17 witnesses make that distinction. I just wanted
18 to make sure she understood the question.
19 That's -- that's it. That's actually my final
20 question.

21 JUDGE BARNETT: The objection is
22 sustained.

23 MR. OLANIRAN: Okay. Thank you.

24 JUDGE BARNETT: Any further voir dire?
25 Any other -- any objection to Dr. Mathiowetz's

1 qualification?

2 Hearing none, Dr. Mathiowetz is
3 qualified as a survey research methodology
4 expert and a questionnaire design expert and
5 also an expert in statistics. I believe that
6 was the third area.

7 MR. LAANE: Yes, Your Honor, thank
8 you.

9 JUDGE BARNETT: Thank you.

10 DIRECT EXAMINATION (Resumed)

11 BY MR. LAANE:

12 Q. And, Dr. Mathiowetz, what was your
13 assignment in the proceeding we're here on
14 today?

15 A. So broadly speaking, I was retained by
16 the Joint Sports Claimants to review the survey
17 conducted by Bortz Associates with respect to
18 my area of expertise.

19 In addition, the Joint Sports
20 Claimants asked me to review other surveys that
21 were produced by other claimants and review
22 those as well as the estimates produced from
23 those. All of those with respect to my area of
24 expertise in survey methods.

25 Q. And did you also review Rebuttal

1 Testimony from various witnesses on the subject
2 of those surveys?

3 A. I did.

4 Q. Okay. Now, Dr. Mathiowetz, you'll see
5 in front of you a binder with your name on it,
6 and if you could just take a look and let us
7 know are Exhibits 1006 and 1007 in there your
8 written direct and written Rebuttal Testimony?

9 A. They appear to be those, yes.

10 Q. Okay. And do you declare that
11 Exhibit 1006, your written Direct Testimony, is
12 true and correct and of your personal
13 knowledge?

14 A. Yes, I do.

15 Q. And do you declare that Exhibit 1007,
16 your written Rebuttal Testimony, is true and
17 correct and of your personal knowledge?

18 A. Yes, I do.

19 Q. And, Dr. Mathiowetz, just, before we
20 get into the details, could you please
21 summarize your conclusions of your review of
22 the 2010 through 2013 Bortz surveys?

23 A. So with the 2010 through 2013 Bortz
24 surveys, we see a study that is similar to and
25 builds upon years of this methodology being

1 brought before the courts; that is, the conduct
2 of a survey, interviewing of cable system
3 executives, being queried about relative values
4 of program categories using a constant sum
5 methodology.

6 The methodology we're going to be
7 talking about here today and which you've
8 probably already heard about for the last few
9 days from Mr. Trautman builds on the
10 methodology that we've seen before and has been
11 used as a foundation in decisions before,
12 thereby providing us clear evidence of its
13 construct validity.

14 So as I undertook the review of the
15 Bortz survey, I looked to the Reference Manual
16 on Scientific Evidence -- that is, the chapter
17 on survey research -- and looked at the
18 guidelines that that chapter offers and said
19 how does the Bortz survey measure up with
20 respect to those guidelines?

21 And following my review and looking to
22 those guidelines, my conclusion is that the
23 Bortz survey provides a valid assessment of the
24 relative valuation of program categories and
25 can be used and relied upon in making decisions

1 about the distribution of copyright royalties.

2 Q. And could you also please summarize
3 the bottom-line conclusions of your review of
4 the Horowitz surveys?

5 A. So with respect to the Horowitz
6 survey, we see a methodology that is similar to
7 Bortz, so, once again, we're talking about a
8 survey of cable system executives being
9 interviewed and queried with respect to a
10 constant sum methodology.

11 But that is where the similarities
12 end. With respect to the survey conducted by
13 Horowitz & Associates, we find or at least I
14 find several problems, significant problems,
15 with the survey. And we will talk about those
16 further today. But just to identify those, the
17 inclusion of this erroneous and misleading
18 information in the description of program
19 categories, the injection of an additional
20 category entitled "other sports," the lack of
21 attention paid to issues related to compensable
22 programming on WGN, and as well as the
23 implementation of their field efforts that led
24 to a very burdensome questionnaire and -- for
25 the respondent. And, once again, we'll talk

1 about these further.

2 So these issues, as I look across
3 them, from my perspective, lead me to conclude
4 that one cannot rely upon the estimates that
5 come from the Horowitz survey with respect to
6 being a valid valuation of -- of the relative
7 value of program categories.

8 Q. All right. Thank you.

9 Let's focus in first on the Bortz
10 survey. And before we get into the specifics,
11 just broadly speaking, what areas do you look
12 at when assessing a survey?

13 A. So I'm going to do a little bit of
14 survey 101, just so we're all on the same page.
15 So there are really three things one wants to
16 think about when they start to looking at a
17 survey or even if you're designing one.

18 The first has to do with sampling. So
19 what is the population of interest? How are
20 they defined? What kind of sampling frame will
21 you use to identify them? How were respondents
22 selected? Who chose to participate once they
23 were sampled? So there's this -- this part of
24 the process that we'll label sampling.

25 The second part of the process that

1 one wants to really think about is instrument
2 design. So what does the questionnaire look
3 like? What are the words used to convey and
4 used to measure? How good is that measuring
5 device? Is it -- can it be seen as both
6 reliable and valid?

7 And then the third thing that one
8 wants to look at is how was this study fielded?
9 What were the methods and modes of data
10 collection? What happened during the data
11 collection? What was the burden that was
12 placed on the respondent?

13 You pull all three of those together
14 to kind of take the overall assessment of the
15 quality of a survey.

16 Q. Thank you. Did you help us prepare a
17 slide as a roadmap to some of the topics you'll
18 be discussing on the Bortz survey?

19 A. Yes, several slides, actually, yes.

20 Q. Jeff, can you put up -- thank you.

21 Okay. So starting at the top here,
22 stratified random sample of Form 3 CSOs, could
23 you please explain that for us?

24 A. So we'll start kind of from this first
25 path focusing in on issues related to sampling

1 in the universe of interest, right?

2 So who here is the universe of
3 interest, right? For the Bortz survey, the
4 universe of interest here is those who have
5 filed Form 3 statements of accounts or, excuse
6 me, remittance forms. That is those who have
7 paid royalties related to distant sums -- I
8 mean distant signals.

9 You've heard already in detail how
10 Bortz conducted their sample. So they start
11 with remittance forms. They sample those. And
12 then go and extract the statements of accounts
13 for the sampled cases.

14 Important here are some language that
15 you may not typically see, thinking about that
16 they did a stratified random sample. That's
17 important for a couple of reasons. Right?

18 Stratification, as opposed to a simple
19 random sample, allows you to have a more
20 efficient sample. It guarantees representation
21 across the characteristic that you're
22 stratifying on.

23 In the Bortz survey, they stratified
24 based on royalties. They made four strata and
25 sampled from within those, making sure that

1 there was representation across all four of
2 those strata.

3 The other advantage of stratification
4 is that one can apply different sampling rates.
5 So, for instance, in Bortz, the systems that
6 had paid the highest royalties were sampled at
7 100 percent, whereas smaller samples were --
8 were sampled at lower rates.

9 So we have here the definition of how
10 or discussion about how they did their sample.
11 And one key point that I want to make, by
12 sampling from -- from the Form 3 submissions,
13 right, we have coverage of about 98 percent of
14 the population, right? Not looking at the Form
15 1 and Form 2.

16 That's important because whenever you
17 start to sample, you want to have a sampling
18 frame that covers the population well; that is,
19 that, you know, makes sure that everyone is
20 potentially eligible for sampling.

21 Q. Now, did you see Dr. Frankel's
22 assertion in his amended Rebuttal Testimony
23 that Bortz should not have included all Form 3
24 systems in the sampling frame but, instead,
25 should have excluded systems carrying no

1 distant signals from the sampling frame?

2 A. I did see that, yes.

3 Q. Okay. And in your opinion, was that a
4 problem with the Bortz sampling frame or not?

5 A. I do not see that as a problem for the
6 Bortz sampling frame because even systems that
7 have zero DSEs are paying a minimum fee. And,
8 therefore, they have contributed to the overall
9 royalties that are subject to the -- to our
10 discussion today.

11 Q. Now, if a system in the sample, it
12 turned out, didn't carry distant signals when
13 they went and looked at the SOA, was a survey
14 administered to that system?

15 A. No, one of the things that Bortz did
16 after they pulled the statements of accounts
17 for the systems that they had sampled was that
18 they "disqualified" three kinds of systems.

19 One were zero DSEs, one were
20 100 percent PBS stations, and the other were
21 100 percent Canadian. Those three types of
22 systems were not interviewed.

23 Q. Okay. I want to come back later and
24 ask you a little bit about Dr. Frankel's
25 revised estimates for the survey, but for now

1 let's move on, on the survey itself.

2 And turning to the second bullet on
3 the slide, constant sum methodology, what does
4 that refer to?

5 A. So we want -- so we're going to leave
6 sampling behind and now turn to questionnaire
7 design. And the key relative valuation
8 question that is used here is in revision of a
9 constant sum methodology that has been used in
10 the past by Bortz.

11 Q. And is there any reason why one would
12 use a constant sum methodology for a survey of
13 this sort as opposed to some other type of
14 scale?

15 A. One of the key advantages of a
16 constant sum methodology is it forces the
17 respondent to have to make tradeoffs across
18 the -- in this case, the program categories.

19 Q. Okay. And how does it do that?

20 A. It -- it asks for -- and we can
21 actually look at the wording for this
22 particular question -- but it asks in this
23 particular case for the respondent to allocate
24 \$100 or 100 points across the various
25 programming categories that are relevant to

1 their cable system.

2 Q. Okay. And, Jeff, can you put up
3 Question 4a as long as we're on the topic of
4 the constant sum question.

5 And is there any other -- are there
6 any guidelines on the number of different
7 categories that can be valued using a constant
8 sum methodology?

9 A. There are no fixed and hard guidelines
10 with respect to how many categories you can ask
11 a respondent about, but clearly there is a
12 literature that says once you are at ten or
13 more categories, you should consider a
14 different methodology.

15 When we look at the administration of
16 the key valuation question, Question 4 in the
17 Bortz survey, cable system executives were
18 asked about either five, six, or seven program
19 categories, clearly within the ten-category
20 limit.

21 Q. And do you have an opinion on whether
22 a constant sum methodology was appropriate for
23 the Bortz survey?

24 A. It is an appropriate approach and
25 clearly it is a revision of a question that has

1 been used and relied upon by the courts in
2 these proceedings in the past.

3 JUDGE STRICKLER: Excuse me,
4 Professor. Good afternoon.

5 THE WITNESS: Good afternoon.

6 JUDGE STRICKLER: You say that once
7 you get to about ten or so categories, you
8 should consider using a different type of
9 methodology perhaps than the constant sum
10 methodology. Was that your testimony a moment
11 ago?

12 THE WITNESS: Yeah, that is what the
13 literature suggests.

14 JUDGE STRICKLER: Do you agree with
15 that literature?

16 THE WITNESS: I do agree with that
17 literature, yes.

18 JUDGE STRICKLER: Is it a problem of
19 falling off a cliff; that is to say that a
20 constant sum methodology is fine right up until
21 you get to ten categories or to the 11th
22 category and then you should discard the
23 constant sum methodology or does the
24 methodology become less valuable as you add
25 more categories, up to ten?

1 THE WITNESS: I don't think there is a
2 good empirical literature that could directly
3 answer your question, but clearly practitioners
4 typically have no problem using six, seven, or
5 eight categories. You see that used quite
6 often in the literature.

7 I don't think people think that there
8 is just -- you know, that there's a cliff that
9 you fall off, but there's certainly not a
10 literature that says that there is a decline
11 with respect to the quality of the data once
12 you get to six, seven, or eight categories.

13 JUDGE STRICKLER: And separate and
14 apart from what the literature says, do you
15 think this number of categories was sufficient
16 -- sufficiently small to be able to do the
17 constant sum methodology?

18 THE WITNESS: Absolutely. For a
19 couple of reasons. First of all, respondents
20 are only faced with the number of program
21 categories that represent the categories of the
22 distant signals. So not everyone faced seven
23 categories. Some of the respondents faced five
24 categories. Some faced six. Some faced seven.

25 Second of all, we'll look at the

1 preliminary questions that were the warm-ups
2 here, where these categories were already --
3 the respondent had exposure to these
4 categories.

5 And, third, they were asked to -- to
6 write these down as they were exposed to them.
7 So they already are beginning to think in these
8 preliminary questions about these categories.
9 So I certainly don't see -- and, finally, we're
10 not talking to lay people, right? We're
11 talking to executives of cable systems. These
12 aren't unknown, you know, constructs to them.

13 JUDGE STRICKLER: Thank you.

14 JUDGE FEDER: Does the literature
15 speak to whether there is a minimum number of
16 categories that are appropriate to use in a
17 constant sum methodology?

18 THE WITNESS: Well, first of all,
19 because this is a relative tradeoff, you have
20 to have at least two entities, right? So you
21 can't ask these types -- it would be awkward to
22 ask this question with only a single entity and
23 say: What's your relative valuation?

24 Typically, when I look at marketing
25 research books, I see, you know, somewhere on

1 the order of four, five, six categories as
2 typical examples that they are giving in that
3 -- in textbooks.

4 JUDGE FEDER: Apart from it being
5 awkward to ask that question, is it
6 uninformative?

7 THE WITNESS: In my professional
8 judgment, it's somewhat uninformative because
9 you're asking a person to sum to 100 percent,
10 you're offering them one option; what more do
11 they have to do but to say I guess it's
12 100 percent?

13 JUDGE FEDER: Well, vote for Putin.

14 (Laughter.)

15 JUDGE FEDER: Thank you.

16 THE WITNESS: But that -- you know,
17 once again, I have never tested a question -- a
18 constant sum question with only a single
19 category to be evaluated.

20 BY MR. LAANE:

21 Q. Dr. Mathiowetz, did you see the
22 suggestion from Dr. Steckel in his Rebuttal
23 Testimony that the -- this question we're
24 looking at here was -- was too complex and
25 unfamiliar for the respondents to answer?

1 A. I did see that critique.

2 Q. Okay. And do you have an opinion on
3 whether that was a problem for the survey?

4 A. I do. And I disagree with
5 Dr. Steckel. When you look at a survey and are
6 evaluating it post hoc, so I was asked to
7 evaluate this after the survey had already been
8 conducted, there are several things you can
9 look for to be indicative of problems with that
10 survey.

11 You look to see whether there were
12 high rates of missing data where respondents
13 said "don't know." You look to see if there
14 are, you know, wild answers that don't fit the
15 norm, right?

16 But, more importantly, you look here
17 to see if there's non-differentiation across
18 categories. And let me explain what I'm
19 talking about.

20 If the task was too complex, and
21 certainly a lot of times in survey questions we
22 ask complex things, but when a task is too
23 complex, respondents will often take kind of
24 the easy way out, right? So what's the easy
25 way out to try to answer this question?

1 One of the ways would be
2 non-differentiation; that is, okay, you've
3 asked me to evaluate these five program
4 categories; I'm just going to assign 20 percent
5 to all of them. Or if there were six
6 categories, I might assign, you know,
7 50 percent to one, and 10 percent.

8 So we don't see that lack -- or we
9 don't see that non-differentiation when we look
10 at the Bortz data. We see no missing data. We
11 don't see indications even on the hard-copy
12 questionnaires that the interviewers wrote
13 notes that said "respondent confused" or
14 anything like that.

15 So from those points, you know, I saw
16 that Dr. Steckel had not brought any empirical
17 data to the table to support his assertion that
18 these were complex. And from my assessment of
19 looking at the data, I disagree with his
20 assessment.

21 Q. Now, you mentioned there had been some
22 -- some evolution in the survey over time.
23 Were there changes in the constant sum question
24 we're looking at here as compared to prior
25 versions of the Bortz survey?

1 A. There were. And maybe we can blow up
2 just the question part of this to make it
3 easier for everyone to see?

4 Q. Sure. Thank you, Jeff.

5 A. So one of the things that -- if you
6 look back at the ruling by the Judges with
7 respect to the 2004-2005 allocation and
8 distribution, one of the concerns expressed by
9 the Judges was that the question, the constant
10 sum question used in the 2004 and 2005
11 questionnaire had reference to relative
12 valuation with respect to attracting and
13 retaining subscribers.

14 And the Judges in their rulings felt
15 that that narrow focus with respect to
16 attracting and retaining subscribers was -- was
17 inappropriate, that a cable system executive
18 may consider all kinds of a wide range of
19 factors in thinking about value, and that the
20 question shouldn't be so narrowly focused.

21 So you'll see here in the wording of
22 this question that there no longer is reference
23 to that narrow focus.

24 Q. Did you see Dr. Steckel's assertion
25 that deleting the language about attracting and

1 retaining subscribers made the question
2 ambiguous?

3 A. I did see that. And here too, I
4 disagree with Dr. Steckel. I don't think the
5 removal of that particular focus changes the
6 task or makes the question confusing or
7 ambiguous.

8 JUDGE STRICKLER: Do you understand
9 that there's language in the current Question 4
10 that you have on the screen, specific language
11 that replaces the language that the Judges had
12 criticized in '04-'05 with regard to not
13 focusing on attracting and retaining
14 subscribers?

15 THE WITNESS: So you'll -- right.
16 You'll see if you -- if you go down to the
17 second paragraph -- I'll read each of the seven
18 programming categories, and let me just note if
19 there were only five relevant, just five,
20 right?

21 "Assume" -- and then further
22 introduction. "Assume your system spent a
23 fixed dollar amount in 2013 to acquire all the
24 non-network programming actually broadcast
25 during 2013 by the stations I listed." And

1 then it goes on to direct the respondent:

2 "What percentage, if any, of the fixed dollar
3 amount would your estimate have spent for each
4 category of programming?"

5 That language has been modified, but
6 you can -- since -- from the 2004-2005, but you
7 can see there's nowhere in this question that
8 has reference to either attracting or retaining
9 subscribers.

10 So there wasn't -- in answer to your
11 question, Your Honor, it wasn't that there was
12 a direct replacement. They pulled that
13 language that the Judges felt was too narrow
14 focused, they pulled it out. They didn't
15 replace it with a set of words, but they --
16 they did make, you know, this change to the
17 questionnaire.

18 JUDGE STRICKLER: Thank you.

19 BY MR. LAANE:

20 Q. Okay. Let's -- if we can go back,
21 Jeff, for a second to the roadmap slide, our
22 next topic here is improved preliminary
23 questions.

24 What does that refer to?

25 A. Before the respondents get to Question

1 4, surprisingly they have a Question 2 and a
2 Question 3. And, typically, you never want to
3 have a survey where you just jump into the main
4 question for a respondent. And part of what
5 you want to do is warm up a respondent.

6 What we see when we look at the 2010
7 to 2013 Bortz questionnaire is two questions,
8 Question 2 and 3, the preliminary questions
9 that were altered from the preliminary
10 questions used in prior questionnaires.

11 So let's take a quick look at them,
12 just to see what I'm talking about. So
13 Question 2b asks: Now, I'd like you to ask how
14 important it was for your system to offer
15 certain categories of programming, et cetera,
16 et cetera. I won't read this all into the
17 record. You have it before you.

18 Why is this a useful question? There
19 is two aspects of this question that I think
20 are important for us to hone in on. The first
21 has to do with the nature of the task the
22 respondent is being asked to answer. This is a
23 ranking question. They have to rank these
24 five, six, or seven categories with respect to
25 their relative importance.

1 So they're already beginning as
2 respondents to kind of tussle with the task of
3 how I perceive these categories, here looking
4 at importance. So, in other words, you're
5 starting to get used to the task they're going
6 to face in the constant sum question, even
7 though here the ranking is a 1 to 7.

8 Let me -- just so that we understand
9 the difference, right, you could have asked
10 them what's known as a rating question and
11 said: How important are each of these? You
12 know, very important, somewhat important, not
13 important at all, right? That's a rating
14 question. That's a different kind of task. So
15 here we see a ranking test.

16 And the other is that, you know, when
17 you start to think about what is value,
18 right -- Question 4 is a relative value
19 question, right -- so you want to start to
20 think about the things that align or may be
21 related to that. Importance may be one feature
22 of those that are useful to look at.

23 If we look at the second warm-up
24 question --

25 Q. Okay. So Question 3?

1 A. Question 3.

2 Q. Thank you, Jeff.

3 A. There was a Question 1. We don't need
4 to look at that. Now we look at a question,
5 once again, that is a ranking question that
6 says: Now, I'm going to ask you how expensive
7 you think it would have been for your system to
8 acquire the non-network programming on the
9 broadcast stations I listed in each of the
10 seven categories, if your system had to
11 purchase that programming directly to the
12 marketplace.

13 So, once again, a ranking task,
14 similar to but not identical to the constant
15 sum question, but at least once again the
16 respondent has to think about, okay, how do I
17 put these in order? Here, now thinking with
18 respect to cost.

19 Q. So, in your opinion, could you tell us
20 whether or not the revised warm-up questions
21 were appropriate for their functions?

22 A. I do think they were. In part what
23 one tries to do as a questionnaire designer is
24 to train a respondent to the tasks they have to
25 face and also to begin to offer to them the

1 context and the focus.

2 And here through these two questions,
3 they've had exposure to the five, six, or seven
4 categories that are relevant to the key
5 valuation question, Question 4.

6 Q. Did you review the criticisms of those
7 warm-up questions in the written testimony of
8 Mr. Horowitz and Dr. Steckel?

9 A. I did.

10 Q. Okay. Did Mr. Horowitz and
11 Dr. Steckel agree with each other about those
12 questions?

13 A. It's quite interesting. They actually
14 completely disagree with each other with
15 respect to their testimony. So Mr. Horowitz,
16 if I remember correctly, stated in his
17 testimony that he felt Question 3 was a
18 distraction to the respondent with respect to
19 then the key valuation question, Question 4.

20 Whereas Dr. Steckel felt that Question
21 3 and Question 4 measured exactly the same
22 thing and, therefore, should be perfectly
23 correlated in the data.

24 Q. And what is your opinion on that?

25 A. Well, not surprisingly, I actually

1 disagree with both of them. So I don't see
2 these as a distraction -- I don't see this
3 question as a distraction, neither Question 2
4 nor Question 3 as a distraction.

5 JUDGE STRICKLER: What is the benefit
6 of Question 3?

7 THE WITNESS: Question 3, once again,
8 I think, just reinforces the nature of a
9 ranking task, reinforces to the respondent the
10 program categories that are relevant, so that
11 they're familiar with them by the time they get
12 to Question 4. And it brings to mind a second
13 dimension that may be part of one's
14 consideration in valuation cost.

15 JUDGE STRICKLER: That cost is the
16 consideration of value?

17 THE WITNESS: It may be. Realize, of
18 course -- you know, people -- how do people
19 value things, right? Importance, cost are --
20 are dimensions that may be of interest.

21 Neither of those is referenced in
22 Question 4. It allows -- Question 4, the key
23 valuation question, allows the respondent to
24 determine what's most salient to him or her in
25 determining relative value.

1 JUDGE BARNETT: Dr. Mathiowetz, the
2 question, as I read it, is one of how these
3 executives or these respondents would -- what
4 they think they would have to pay to get these
5 various categories of programming in an
6 unregulated market. Is that how you read that
7 when it says open market?

8 THE WITNESS: That's my
9 non-econometric reading of this question, yes.

10 JUDGE BARNETT: Okay. And -- and this
11 is a question that asks them to categorize
12 programming according to our groups, even
13 though when they acquire programming, they
14 acquire it signal by signal, station by
15 station, and each station may have any number
16 of categories of programming in a given day.

17 Is there anything in the data that
18 were developed by this survey that indicates
19 whether these respondents referred to what they
20 actually paid or if they were valuing these
21 things just according to some external
22 knowledge or experience about the categories?
23 Is there anything in any of the results that
24 would have -- that would inform us?

25 THE WITNESS: You know, I haven't

1 looked at the data from that perspective. I
2 don't think there is.

3 JUDGE BARNETT: Okay.

4 THE WITNESS: Because here they are
5 ranking, you know, and I --

6 JUDGE BARNETT: They're not -- they're
7 not applying a dollar value here.

8 THE WITNESS: No.

9 JUDGE BARNETT: They're simply
10 ranking.

11 THE WITNESS: They're simply ranking.
12 So when something is 1 -- you can't take 1 to 7
13 as an ordinal metric, that the distance from 1
14 to 2 is the same as the distance from 2 to 3.

15 So how that translates to dollars, I
16 think, would be almost impossible in the data
17 post hoc to understand.

18 JUDGE BARNETT: So there's no way for
19 us to know whether they were -- in the back of
20 their minds, these wheels were turning and they
21 were saying: Gosh, we spent this much for
22 sports networks and we spent this much for,
23 WGNA. And it just -- it's just a ranking?

24 THE WITNESS: It is just a ranking.
25 Sorry.

1 JUDGE BARNETT: No, don't be sorry.

2 I'm -- I'm just trying to understand.

3 BY MR. LAANE:

4 Q. And, Dr. Mathiowetz, a related
5 question on Number 3. Dr. Steckel argues in
6 his Rebuttal Testimony that there must be a
7 problem with the Bortz survey because he didn't
8 find a perfect 1.0 correlation between the
9 answers to this question, Question 3 on cost,
10 and the relative value question.

11 I mean, do you have an opinion on that
12 analysis from Dr. Steckel and, if so, what is
13 it?

14 A. I -- I do have an opinion on that. I
15 think it's important that we look at -- so here
16 we're looking at Question 3, asking how
17 expensive do you think it is, you think it
18 would have been for your system to acquire
19 these programs in this free and open market?

20 Let's go back and look at Question 4,
21 if we can.

22 Can we do that?

23 Q. I think it's two slides back, Jeff,
24 maybe two slides back. There you go.

25 A. Question 4 here says: Now, I'd like

1 you to estimate the relative value. Right? So
2 these are not the same question. They're
3 different constructs that the respondent is
4 being tasked with.

5 So on a theoretical ground, I wouldn't
6 expect there to be a 1.0 correlation. But then
7 we have to remember the nature of the task the
8 respondent is facing in Question 3 versus
9 Question 4.

10 In Question 3, the respondent is asked
11 to rank the programs from 1 to 5 or 1 to 6 or 1
12 to 7. There can be no ties. You know? And
13 it's an absolute 1 to 7 ranking.

14 When they get to this question, they
15 have \$100 to work with. They can assign equal
16 valuations to program categories -- to some of
17 the program categories. Given the nature of
18 those two different tasks with a 1 to 7 with
19 absolutely no ties allowed and a zero to 100
20 where ties are allowed and a zero is allowed,
21 mathematically you couldn't get a 1.0
22 correlation between these two questions.

23 Q. All right, thank you.

24 Jeff, if you could go to slide 7,
25 please.

1 I think we're now on the WGN-only
2 survey. The Judges have already heard the
3 details from Mr. Trautman on how that works, so
4 I'm not going to ask you about that, but I did
5 want to ask your opinion on whether the
6 addition of the WGN-only survey process was an
7 improvement to the Bortz survey.

8 A. Absolutely. By being able to identify
9 compensable programs, you solidify for
10 respondents the focus of what they are to be
11 valuing when they get to the relative value
12 question.

13 Q. Dr. Steckel at page 15 of his rebuttal
14 describes the new Bortz study WGN-only survey
15 as "a positive step but a small one."

16 Do you agree or disagree with that
17 characterization?

18 A. Well, I will agree with his assertion
19 that it was a positive step, but I wouldn't
20 call it small. When you -- when you look at
21 WGN, right, the proportion of systems that
22 carry WGN-only are 40 to 45 percent of all
23 systems that transmit WGN, 40 to 45 percent of
24 those -- that's the population who is getting
25 these program summaries. That is not a small

1 group getting this improved version of the
2 questionnaire.

3 Q. The last bullet focused on top eight
4 distant signals. Can you briefly describe that
5 aspect of the survey for us?

6 A. So Bortz decided that rather than
7 review all of the distant signals with cable
8 system executives, they would only review the
9 top eight signals that were transmitted by that
10 cable system in any one -- in the year of
11 interest.

12 And if we look at the distant -- you
13 know, the number of distant signals, right,
14 that -- that has a really long tail; that is
15 that there are systems out there that have --
16 or cable systems that transmit more than 50
17 distant signals. That's an unreasonably long
18 number of systems to have to review with an
19 executive.

20 The analysis that Bortz did said by
21 focusing in on the top 8 percent or the top
22 eight distant signals, we cover pretty much --
23 we miss about 5 percent of the subscribers.
24 And those subscribers don't look different with
25 respect to the program categories than those

1 that are already included in these distant
2 signals. So they didn't feel this would bias
3 the data.

4 Q. Now, in Dr. Steckel's written
5 rebuttal, he argues the limit should have been
6 less than eight because he says there is a
7 seven-item limitation on working memory.

8 What's your opinion on that? Well,
9 the literature on working memory, working
10 memory is about if I lead you a list of words,
11 how many can you retain in your head? We have
12 all seen these psychology experiments, right?

13 JUDGE BARNETT: Did you rank these
14 executives by age category?

15 (Laughter.)

16 THE WITNESS: Now, now. Don't have
17 that demographic information in the data.

18 JUDGE BARNETT: Thank you.

19 THE WITNESS: But we're not asking
20 these cable system executives to retain a bunch
21 of words they haven't heard. The review of the
22 eight -- the top eight distant signals is
23 simply to remind them of the focus of this
24 questionnaire, right? So it is not a working
25 memory kind of issue.

1 And you have to remember that just
2 because Bortz looked at the top eight, many of
3 these cable systems had fewer than eight
4 distant signals transmitted.

5 BY MR. LAANE:

6 Q. By the way, did the Horowitz survey
7 limit the number of signals respondent would
8 have to consider to seven or less as suggested
9 by Dr. Steckel?

10 A. No. So in the Horowitz survey, all of
11 the distant signals were reviewed with the
12 cable system executive, which means that for
13 some of these cable system executives, they got
14 the far end of that tail, which can be in
15 excess of 50 some distant signals being
16 reviewed with them.

17 Q. Now, taking into account not just what
18 we have discussed here so far today, but also
19 the matters addressed in your written
20 testimony, can you just summarize for us your
21 overall opinion on the Bortz survey?

22 A. So as we talked about, from the
23 perspective of sampling, from the perspective
24 of questionnaire design with respect to
25 implementation and looking at the reference

1 guide on -- or the reference manual on
2 scientific evidence, I believe that the Bortz
3 survey is a valid and reliable survey on which
4 one can use the estimates for the question
5 before the court here today.

6 Q. Now I would like to turn to the
7 Horowitz survey. And earlier near the
8 beginning of your testimony, you summarized
9 your conclusions on that, but I would like to
10 go into that in somewhat further detail now.

11 Do you also have a roadmap slide on
12 those topics?

13 A. I do.

14 Q. Jeff, could you put that up, please?

15 Even before we get into the specifics,
16 can you just give sort of an overview of the
17 general methodological issues relevant to your
18 review of the Horowitz survey?

19 A. So here I am going to do a little
20 Questionnaire Design 101. So there are a few
21 things that we want to remember with respect to
22 thinking about principles of questionnaire
23 design.

24 First and most important is when you
25 write questions, you want to make sure that the

1 questions don't bias the respondents. There
2 are all kinds of questionnaires we see out
3 there in the public that we look at and we go:
4 Oh, my gosh, how did they ask that particular
5 question? And it is obvious to us that those
6 would bias or push respondents towards a
7 particular direction.

8 So that's maybe one of the first rules
9 I teach my students. But there are a couple
10 more subtle things to remember.

11 The second, you know, the point that
12 when respondents hear a question, they take and
13 believe that the questionnaire designer is
14 providing them with truthful information. And
15 they integrate that information provided in the
16 questionnaire as they formulate their
17 responses.

18 So the provision as information as
19 part of the question is taken as fact and can
20 help shape the respondents' views. Part of
21 what you want -- we'll talk about, we're going
22 to talk about examples and such as, when I
23 first start working with clients, most clients
24 when they write questionnaires say: Well,
25 let's put in some examples because examples

1 will help clarify the question.

2 And examples can be actually quite
3 dangerous to include because rather than
4 clarify for the respondent, examples can limit
5 their focus.

6 So, for instance, if we wanted to say
7 how many times did you consume dairy products
8 in the past week, such as milk or ice cream,
9 okay, well, that milk and ice cream helped
10 explain the dairy products, but you have left
11 out all kinds of other things that are dairy
12 products.

13 And by not including them in the
14 examples, you have left the respondent to think
15 more concentratedly about milk and ice cream
16 and not other dairy products.

17 Q. And I guess that leads us here to the
18 first point on the slide. What are the issues
19 with the Horowitz survey's use of examples?

20 A. So I'm sure Mr. Trautman, because he
21 covered this in his rebuttal written testimony
22 has already testified to this, but when you
23 look at the Horowitz survey, in the description
24 of the program categories you see inclusion of
25 examples in the such as categories that are

1 wrong and are misleading.

2 JUDGE STRICKLER: Professor, before
3 you pointed out that the respondents to the
4 survey are sophisticated businesspeople who
5 know this area. Wouldn't such people be
6 relatively more resistant to inappropriate or
7 inaccurate examples than people who did not
8 have that type of expertise?

9 THE WITNESS: Certainly they are going
10 to be somewhat more resistant, but remember
11 that this information being conveyed to them is
12 helping them identify, okay, exactly what is in
13 each one of these five, six, or seven
14 categories?

15 Who are they to stop the interview --
16 they are not going to stop the interviewer and
17 say: Wait a minute, I don't think WGNA
18 broadcasts any game shows as compensable
19 programming. And that's not going to happen.

20 They are going to take that
21 information in and say: Okay, I was thinking
22 about this, but they want me to include these
23 other things.

24 And to the extent that information is
25 wrong, they are going to shift things to

1 categories inappropriately or give more
2 credence or less credence to that. So I am not
3 saying that they are naive, but still in the
4 process of answering a question that is going
5 to help shape their response.

6 JUDGE STRICKLER: Thank you.

7 BY MR. LAANE:

8 Q. Now, what if along with examples that
9 were incorrect or misleading, the Horowitz
10 survey also had some examples that were
11 correct. Would that change your assessment of
12 the survey?

13 A. Well, don't forget here the task is a
14 relative value question. So if something is
15 wrong in one category, that shifts or biases
16 the respondent, that has impact on all the
17 other categories because everything has to add
18 to 100 percent.

19 Q. Moving on to our next topic here,
20 addition of the "other sports" category, what
21 is the issue with that?

22 A. Well, in the design of the Horowitz
23 survey, we see this new program category,
24 "other sports," right? I have not seen a
25 justification for the addition of this

1 additional category offered by any of the
2 Program Suppliers' experts.

3 And when I look at the "other sports"
4 category, I question whether it has sufficient,
5 you know, air time to qualify as an "other
6 sports" or to stand on its own merits as
7 another category.

8 And I think if we look at some of the
9 WGN-only examples, this will become a bit more
10 clear.

11 Q. Jeff, could you put up slide 9,
12 please.

13 So we're looking here at the "other
14 sports" question from the 2013 Horowitz
15 WGN-only survey. Can you tell us what if any
16 issues there are with this example?

17 A. So down at the bottom right E, it
18 says, you know, other sports programming
19 broadcast on WGN, examples include horse
20 racing.

21 In 2013, if I remember correctly,
22 there was a single horse race broadcast on WGN.
23 The examples don't include horse racing,
24 conveying an idea that there were multiple.
25 There is a single horse race.

1 But I think it becomes more -- even
2 more obvious when we look at WGN, the question
3 used for WGN, plus PTV.

4 Q. Jeff, could you go to that one,
5 please?

6 A. So here was the program description
7 read to those respondents who transmit WGN plus
8 PTV as their only distant signals. Other
9 sports programming broadcast on that signal or
10 that station, examples include NASCAR auto
11 races, professional wrestling, and figure
12 skating broadcasts.

13 Those -- those categories were not
14 broadcast on WGN plus PTV. So now coming back
15 to Your Honor's question, right, okay, I am a
16 knowledgeable, you know, cable system
17 executive, but I purchase distant signals. I
18 don't purchase programs.

19 Now you are asking me to evaluate a
20 program that you have defined as having content
21 that was never broadcast on those distant
22 signals. That can only be biasing with respect
23 to thinking about how respondents formulated
24 their responses in answer to these categories.

25 Q. Jeff, could you go on to slide 11,

1 please.

2 We're back to our list here. And the
3 next topic is "failure to identify compensable
4 WGNA-only programming."

5 Can you explain that issue for us?

6 A. Right. So we have already talked
7 about in the Bortz survey in -- in response to
8 criticism that has been offered in previous
9 rulings in these proceedings, one of the
10 concerns raised in the last ruling was about
11 compensable programming.

12 So Bortz undertook the inclusion for
13 WGN-only, these programming summaries, and that
14 was administered when the only distant signal
15 transmitted was WGNA. And in the Horowitz
16 survey, we see none of those improvements. We
17 see only asking the executive to consider only
18 those programs that are compensable without
19 identifying to them what those programs are.

20 Q. All right. Thank you.

21 And the last topic here, "undue burden
22 on respondents."

23 Could you explain what that's
24 referring to, please?

25 A. Well, the third aspect that I talked

1 about in Survey Research 101 is implementation,
2 and how one goes about administering a survey.

3 And we see in the Horowitz survey
4 because of the design by which they pursued
5 respondents, we see an enormous burden placed
6 on these respondents; where cable system
7 executives had to respond about a large number
8 of cable systems in responding to the Horowitz
9 questionnaire.

10 Q. Okay. And do you have a slide that
11 helps put those numbers in perspective?

12 A. I do. And I will go into a little bit
13 more detail about the differences in the
14 implementation of these two studies.

15 Q. Okay. Please do.

16 A. So let's first stop and think about '
17 the Bortz sample and pursuing respondents
18 there. They began at the point of the cable
19 systems, asked if that person was knowledgeable
20 about answering questions about the purchase of
21 programming categories. And if not they were
22 bumped up to, you know, a regional office.

23 So in the Bortz survey, they begin at
24 the cable system level and move up if they need
25 to. In addition, when a cable system executive

1 in the Bortz survey was being interviewed about
2 more than one cable system that was sampled, he
3 or she was administered multiple
4 questionnaires.

5 That is, for every single -- you know,
6 they only had to focus on a single cable system
7 in response to a questionnaire. And if there
8 was other cable systems, they were administered
9 a second questionnaire.

10 So what you see here, the numbers in
11 front of you is that in the Bortz sample,
12 respondents answered for 1 to 11 -- across the
13 four years, 1 to 11 cable systems. And on
14 average each cable system executive answered
15 for 2.2 cable systems.

16 When we look at the Horowitz study, we
17 really have to think about two aspects of the
18 Horowitz survey. Horowitz drew not only a
19 sample that was used by Dr. Frankel in
20 estimation, Horowitz asked the universe of
21 cable system executives.

22 So, in other words, they pursued all
23 cable system executives and queried them about
24 all cable systems. So while the sample that
25 you will hear estimates in Horowitz come from

1 the sample where we see the respondent had to
2 answer on average for 4.7 cable systems, and we
3 see a range from 1 to 38 cable systems that
4 that executive is responding for, the actual
5 burden that these cable system executives had
6 to respond for was the universe.

7 And what we see from the Horowitz data
8 is on average these cable system executives
9 were answering about 8.5 cable systems and
10 ranging anywhere from one to 60 cable systems.

11 And I want to add one more note to
12 this. In contrast to Bortz, in the Horowitz
13 administration of the survey, when a cable
14 system executive was answering about multiple
15 cable systems, if those cable systems were
16 transmitting the same distant signal, they were
17 administered one questionnaire to report about
18 all of those cable systems with the same
19 distant signal, even if those were across
20 diverse geographic areas.

21 Q. And why does that matter?

22 A. That matters for a couple of reasons,
23 but one of the things I am most concerned about
24 is that when you look at the Horowitz data, you
25 are not looking at data that was collected from

1 2- or 300 independent cable system executives.
2 You are looking at data that was collected from
3 a much smaller number of executives than is
4 realized in the Bortz sample.

5 And why is that a concern? One, those
6 cable system executives are being asked to make
7 summary judgments across multiple cable systems
8 in a single interview. But, second, any single
9 respondent could have an enormous influence on
10 the data. And that's -- I think we have a
11 slide to help look at that.

12 JUDGE STRICKLER: Before you leave
13 this slide, is there a reason why it is not
14 necessary to have a column that is called Bortz
15 universe the same way that you have a Horowitz
16 universe?

17 THE WITNESS: Remember, Bortz only
18 interviewed people who were selected in their
19 sample. In Horowitz, they interviewed cable --
20 all -- they attempted to interview every single
21 executive of all cable systems every year.

22 So the universe here isn't the
23 sampling frame universe. It is who they
24 actually went out and interviewed. Now, they
25 don't use all of that data in their estimation.

1 They only use the sample. But the respondent
2 with respect to their level of burden was asked
3 about all of the cable systems.

4 So that means, for instance, this one
5 respondent -- I believe in 2013 -- was asked
6 about 60 cable systems, even though only 38 of
7 those cable systems are used for estimation
8 purposes.

9 JUDGE STRICKLER: Thank you.

10 BY MR. LAANE:

11 Q. Jeff, if you could go to the next
12 slide. And just so we're clear on this one,
13 here are we looking for Horowitz at the
14 universe or just at the subset that was the
15 sample?

16 A. So here I'm focusing in just on the
17 subset that's the sample, so that we can talk
18 about kind of the impact on the data that are
19 being used by Dr. Frankel in estimation.

20 And let me explain what we're looking
21 at. And maybe just for simplicity, we will
22 look just at 2013. So what I have done in
23 looking at the Horowitz, or as Mr. Trautman has
24 also produced in his appendix, right, you can
25 see that in 2013 seven respondents in the

1 Horowitz data were reporting for ten or more
2 cable systems.

3 The proportion of the data used in the
4 estimation by Dr. Frankel that's accounted for
5 by these seven respondents, is 62 percent. So
6 62 percent of the data come from just these
7 seven executives.

8 And, in fact, if you look at the top
9 two respondents; that is, the two who had the
10 highest burden, they account for 29 percent of
11 the data in 2013.

12 Q. And what are the implications of that
13 degree of respondent concentration?

14 A. Well, when I see that degree of
15 concentration, what I want to be sensitive to
16 is did that person have an undue influence with
17 respect to the data or is anyone an outlier
18 that gets repeated?

19 So I actually looked at this one
20 respondent in 2013 who had responded 38 times.
21 If you look at that respondent, he or she is
22 reporting for 17 WGNA-only stations or cable
23 systems. All of the valuations for those 17
24 WGNA cable systems are valued exactly the same.

25 And when you look at it, his or her

1 valuation for syndicated series is 60 percent.
2 Well, in the Horowitz data, there is maybe one
3 or two respondents at 50 percent for syndicated
4 series but everybody else is between 10 and
5 25 percent.

6 So here you have a single individual
7 who has a lot -- who is responsible or
8 accountable for a large portion of the data,
9 for which they appear to be an outlier. Now,
10 why is that an issue?

11 Well, you can go further in the
12 analysis and look at the impacts of those
13 people if you want to.

14 Q. And, Dr. Mathiowetz, I guess just to
15 wrap up this portion of the discussion, could
16 you summarize for us your overall conclusions
17 on the utility of the Horowitz survey?

18 A. For the reasons I have enumerated
19 here, with respect to the issues in the
20 provision of misleading or incorrect
21 information, with respect to the addition of an
22 "other sports" category, without -- failing to
23 pay heed to the issue of compensable
24 programming, as well as the burden placed on
25 the respondents so that we see the kind of

1 undue need or concentration of data related to
2 a small number of respondents, for these
3 reasons I would not rely on the Horowitz data
4 as either valid or reliable for issues of
5 program category valuation.

6 Q. Thank you.

7 I now want to turn to the amended
8 Rebuttal Testimony of Dr. Stec. And have you
9 reviewed -- that's Stec, not Steckel. Program
10 Suppliers made it confusing for us that way.

11 Have you reviewed Dr. Stec's opinions
12 on the reliability of the Bortz survey?

13 A. I have, yes.

14 Q. Dr. Stec opined that the Bortz survey
15 answers given by the same CSOs across different
16 years are not consistent and, therefore, the
17 survey is not reliable in his opinion.

18 Do you have an opinion on whether or
19 not that analysis by Dr. Stec was an
20 appropriate way to assess the reliability of
21 the Bortz survey?

22 A. So just so we remember what Dr. Stec
23 did, right, he took the Bortz data, and when he
24 saw that in any years there was -- the same
25 cable system was being interviewed, he linked

1 those data.

2 Sometimes those data were linked from
3 2010 to 2013; sometimes from further in the
4 past to 2013. So he is linking data not just
5 for adjacent years, but looking at consistency
6 of response across any linked data.

7 And then he is comparing those
8 responses, right, to see if there is
9 consistency. Well, first of all, that's
10 problematic for multiple reasons. First, those
11 cable systems might have different distant
12 signals, and Dr. Stec did not control for the
13 fact that the same cable system might have
14 different distant signals being transmitted.

15 Second, you can't have a measuring
16 device that is sensitive to change and not
17 expect to see change. Traditionally, when we
18 think about the measurement of reliability as
19 statisticians, we talk about the measurement of
20 the same person using the same instrument in
21 the same time frame with nothing else having
22 changed.

23 Over adjacent years, things change;
24 different subscribers, perhaps different
25 importance of different programs. New things

1 coming on to the market where people might now
2 be watching one of these program categories
3 more on their laptop than over a distant
4 signal.

5 So, first of all, one can't simply
6 look at any two look two matched points and
7 say: Oh, we're going to look at that
8 correlation. And if that correlation isn't
9 close to 1, then we have unreliable data
10 because you wouldn't expect it to be 1, given
11 both changes in distant signals that were
12 transmitted, as well as changes over time.

13 Q. What pattern of responses would be
14 required for Dr. Stec's analysis to show a 1.0
15 correlation?

16 A. In order to see a 1.0, you would have
17 to see exactly the same valuation in every
18 program category, regardless of how many years
19 separated those cable systems in his matched
20 data set.

21 Q. You mentioned distant signal carriage
22 and a number of other factors that might change
23 from year to year.

24 Did Dr. Stec control for any of those
25 factors in his analysis?

1 A. Not from my -- from my review of his
2 analysis, no.

3 Q. Is there any way the data on responses
4 over time could be used to provide some
5 information on consistency?

6 A. Sure, one could, for instance, look at
7 adjacent years for the same cable systems
8 controlling for the mix of distant signals,
9 making sure it was the same distant signals,
10 and then look at one might consider reasonable
11 change over time, right?

12 So there is no reason to think that
13 someone is going to value these program
14 categories exactly the same from year to year,
15 but if you are carrying the same distant
16 signals with a similar subscriber mix and
17 similar royalties, one can imagine that program
18 categories within plus or minus of 10
19 percentage points would be seen as relatively
20 consistent.

21 Q. Now, shifting to the second analysis
22 Dr. Stec did, he also compared systems, Bortz
23 survey responses to their Horowitz survey
24 responses.

25 Do you have an opinion on whether that

1 was an appropriate way to assess the
2 reliability of the Bortz survey?

3 A. I do. Clearly for all the reasons I
4 have enumerated here, the Bortz and Horowitz
5 measuring devices are very different measuring
6 devices. So you can't use one to judge the
7 other with respect -- you can't use the
8 Horowitz data to say the Bortz data are
9 unreliable because it doesn't match the
10 Horowitz data.

11 I wouldn't want it to match the
12 Horowitz data in light of all of the issues
13 that I have enumerated about that data
14 collection effort.

15 MR. LAANE: May I approach the
16 witness, Your Honor?

17 JUDGE BARNETT: You may.

18 BY MR. LAANE:

19 Q. Dr. Mathiowetz, I am just going to
20 hand you a copy of Dr. Frankel's amended
21 Rebuttal Testimony. And, Jeff, if you could
22 give me the ELMO, please.

23 JUDGE BARNETT: Is this -- can you
24 identify this?

25 MR. LAANE: Yes, this is Allocation

1 Hearing Exhibit 6011 from the Program
2 Suppliers.

3 JUDGE BARNETT: And is it admitted?

4 MR. LAANE: I believe it is already
5 in. Yes.

6 JUDGE BARNETT: Thank you.

7 BY MR. LAANE:

8 Q. So here at Table 2, you see
9 Dr. Frankel's adjustments to the Bortz survey
10 estimates, and you will see above that he
11 indicates he has made two adjustments, one to
12 account for the inclusion of zero DSE systems;
13 that is, systems not carrying distant signals
14 in the sampling frame and a second to adjust
15 for PTV-only and Canadian-only systems.

16 Did you review Dr. Frankel's
17 underlying calculations to that table?

18 A. I did. And just to represent now,
19 we're looking here at 2010, but there are
20 subsequent tables in this report that are for
21 2011, 2012, and 2013. And I have reviewed that
22 full set.

23 Q. Okay. Great.

24 And how much of Dr. Frankel's
25 adjustment is attributable to adjusting for the

1 first issue, the inclusion of zero DSE systems
2 in the sampling frame?

3 JUDGE BARNETT: Is it possible to
4 focus this just a bit? It is very blurry.

5 MR. LAANE: I can try.

6 JUDGE BARNETT: That's much better.

7 THE WITNESS: Much better.

8 BY MR. LAANE:

9 Q. So how much of this adjustment of
10 Dr. Frankel's adjustment is attributable to
11 adjusting for the inclusion of zero DSE systems
12 in the sampling frame?

13 A. So shifting to excluding zero distant
14 signals in the population weights does not
15 impact the estimates produced by Bortz, so it
16 has zero impact.

17 Q. Okay. So his adjustments are merely
18 driven by what he did with respect to PTV-only
19 and Canadian-only systems?

20 A. Yes. So the way he added in PBS-only
21 and Canadian-only, as well as stations that are
22 joint PBS and Canadian-only stations have -- is
23 the driving factor in why his estimates are
24 different from the Bortz survey.

25 Q. And are there any issues with the

1 methodology used by Dr. Frankel in his
2 adjustments for PTV-only and Canadian-only
3 systems?

4 A. Yes, there are. In Dr. Frankel's
5 adjustments, he treats and adds in by strata
6 100 percent of the PBS-only or Canadian-only
7 stations and treats them as if all 100 percent
8 would have participated in the survey had they
9 been selected by Bortz.

10 That -- we certainly don't see
11 100 percent participation in the Bortz survey.
12 And that's what leads to the difference in his
13 estimates between his adjustments for PBS-only
14 and other estimates that have been presented.

15 Q. Okay. And just to break that down for
16 a second, it sounds to me like you are saying
17 he -- he was taking things at 100 percent at
18 two different stages, so first except for the
19 -- there is one stratum with the largest system
20 where they do include them all in the sampling
21 frame, correct?

22 A. Correct.

23 Q. Right. But then in the other strata,
24 they -- they sample at less than 100 percent?

25 A. They do, yes.

1 Q. Okay. But are you saying Dr. Frankel
2 was just acting as if each strata was sampled
3 at 100 percent?

4 A. He did.

5 Q. Okay. And then the next level, once
6 you have the sample, you go out and take the
7 survey. Some people respond; some don't. So
8 if the second 100 percent that he was assuming,
9 there would be 100 percent response rate?

10 A. Yes.

11 Q. How does that compare to the actual
12 response rate?

13 A. The actual response rate across the
14 years, if we look at across all four strata,
15 are somewhere around 50 to 54 percent for the
16 Bortz survey.

17 Q. Can you tell us whether this means
18 Dr. Frankel's adjustments over-represent PTV?

19 A. They do over-represent PTV. And we
20 can actually look at the impact of his
21 100 percent assumption in his calculations by
22 comparing it to other estimates that adjust for
23 100 percent PBS stations.

24 Q. Jeff, can you bring up the next slide,
25 please. It should be Number 14. I am not

1 seeing it. Are we still on the ELMO? Here we
2 go.

3 All right, Dr. Mathiowetz, please
4 explain these figures to us.

5 A. So we have here three columns of
6 estimates. The first column are the unadjusted
7 Bortz survey estimates.

8 JUDGE BARNETT: Is this for a
9 particular year?

10 THE WITNESS: Excuse me?

11 JUDGE BARNETT: Is this for a
12 particular year?

13 THE WITNESS: This is across all four
14 years.

15 JUDGE BARNETT: Thanks.

16 THE WITNESS: Let me just quickly look
17 and see if that's -- yes. This is across all
18 four years.

19 And we didn't talk about that here,
20 but clearly in Mr. Trautman's both direct and
21 his written rebuttal statement, you know,
22 states that the 100 percent PBS and 100 percent
23 Canadian were not included in the survey. It
24 has been well acknowledged.

25 So we have seen other claimants

1 provide adjustments to account for this lack of
2 100 percent PBS and 100 percent Canadian. And
3 so let's move to the last column. That is the
4 column that represents Ms. McLaughlin's
5 adjustments.

6 And here we see that her adjustments
7 end up in PTV representing about 7.5 to
8 8.5 percent valuation and Canadian, 1.2 to 2.2.

9 In contrast, what you see with respect
10 to Dr. Frankel's estimates are estimates for
11 PTV and Canadian that are twice that, at
12 50.8 percent and 4.8 percent respectively.
13 Well, that difference is exactly due to his
14 inclusion of 100 percent or assuming
15 100 percent response rate for PTV-only and
16 Canadian-only stations, and Ms. McLaughlin's
17 treating these stations at the response rate
18 realized in the Bortz survey.

19 In other words, when she did her
20 adjustment, she states in her -- I forget if it
21 is the written rebuttal or the amended, one of
22 them -- she clearly states that she has taken
23 the Bortz response rate into account and
24 applied that here.

25 And that difference, so clearly with a

1 response rate of about 50 percent, we see that
2 the Dr. Frankel's estimates are twice that of
3 Ms. McLaughlin's.

4 BY MR. LAANE:

5 Q. Okay. And as a matter of methodology,
6 do you have an opinion on whether Dr. Frankel's
7 assumption of 100 percent sampling and
8 100 percent response rate was appropriate or
9 inappropriate?

10 A. Inappropriate. I don't know anyone
11 who has realized 100 percent response rate in
12 -- for any survey.

13 Q. Thank you, Dr. Mathiowetz. I have
14 nothing more at this time.

15 A. Thank you.

16 JUDGE FEDER: Dr. Mathiowetz, do you
17 find Dr. McLaughlin -- I am not sure what the
18 appropriate title is -- did you find that
19 methodology appropriate?

20 THE WITNESS: So clearly
21 Ms. McLaughlin takes into account the response
22 rate. From what I can tell, I believe she does
23 also sample or populate it as if PTV-only and
24 Canadian-only were sampled at 100 percent, as
25 if they were in the certainty strata.

1 That -- let me tell you I'm a little
2 bit more on shaky ground with respect to that
3 because she doesn't detail that in her written
4 Rebuttal Testimony the way she does detail the
5 treatment of the 55 percent response rate.

6 JUDGE FEDER: Okay. Stepping back a
7 little bit, Mr. Trautman acknowledged that
8 there needs to be some kind of adjustment to
9 the PTV and Canadian shares because of that
10 issue of excluding the PTV-only and
11 Canadian-only systems.

12 But he does not offer an adjustment.
13 And I take it you are not offering an
14 adjustment here either, are you?

15 THE WITNESS: That's correct.

16 JUDGE FEDER: Is there -- and you are
17 criticizing the Frankel proposed adjustment.
18 Is there any adjustment in the record that
19 you're aware of that seems appropriate to you?

20 THE WITNESS: I come here as a survey
21 methodologist, and now you want me to opine on
22 an economic analysis, but I will venture out.

23 Clearly I think Ms. McLaughlin has
24 tried to take into account a realistic response
25 rate in making her adjustment. I would have

1 to, before I endorsed it wholly, I would have
2 to spend time to make sure to fully understand
3 the methodology she used.

4 JUDGE FEDER: Fair enough.

5 Another question. You testified about
6 some of the changes that were made in the Bortz
7 survey methodology from the previous iteration
8 in '04-'05. And, for example, you described
9 the approach to dealing with non-compensable
10 programming on WGN as an improvement in the
11 survey methodology.

12 And if I remember correctly, you
13 described the change in the wording to Question
14 4, the constant sum question, to remove
15 language about acquiring and retaining
16 subscribers being something that was driven by
17 criticism by the Judges in the previous
18 proceeding.

19 What I didn't hear you say was that
20 that constituted an improvement to the survey
21 instrument. Is it your professional opinion
22 that that was an improvement?

23 THE WITNESS: I'm sorry if that wasn't
24 clear, yes, because I would concur with what
25 the Judges had stated in their ruling, that

1 valuation shouldn't be constrained by just
2 thinking about retaining and attracting
3 subscribers.

4 They listed in their ruling, you know,
5 that there can be other factors, right? When
6 you have a whole range of factors, you don't
7 want to list them ad nauseam. It is better to
8 leave -- to be silent and let the respondent
9 answer with respect to what's most salient to
10 them.

11 JUDGE FEDER: Thank you.

12 JUDGE BARNETT: We have about eight
13 minutes. Who would like to begin
14 cross-examination?

15 MR. CHO: I have 45 minutes worth, but
16 I can start with eight minutes today.

17 JUDGE BARNETT: You may have your
18 eight minutes today.

19 CROSS-EXAMINATION

20 BY MR. CHO:

21 Q. Good afternoon, Dr. Mathiowetz. My
22 name is Dustin Cho, and I represent the Public
23 Television Claimants in this case.

24 A. Okay. Everyone needs a name tag, so I
25 know who the players are.

1 Q. Yes, multi-party proceedings are
2 trickier.

3 Dr. Mathiowetz, you identified several
4 flaws in the Horowitz survey; is that right?

5 A. Yes.

6 Q. Do you have any reason to think that
7 any of the flaws that you have identified would
8 have biased the Horowitz survey results in
9 favor of the Public Television Claimants?

10 A. I had not thought of the framing with
11 respect to that.

12 Q. Of course that's how we were thinking
13 about it.

14 A. Of course. Because as I stated
15 earlier, it is a relative value question, so
16 you have only got a pie, it gets divided up.

17 Once one category gets a larger share
18 because of biasing wording, another category
19 gets less or vice versa. How that flows with
20 respect to Public Television, I haven't -- I
21 haven't focused my laser focus in with respect
22 to that, but I, you know, I would have to go
23 back and look specifically at the descriptions
24 of the program categories in order to be able
25 to answer that question.

1 Q. Just looking at the criticism that you
2 have listed here in paragraph 51, which is up
3 on the screen, do any of those flaws that you
4 point out result in a bias of the Horowitz
5 survey in favor of Public Television?

6 A. So once again, I'd have to go back and
7 look specifically at the descriptions that were
8 used in -- for Public Television with respect
9 to what programs were listed in the "such as."

10 Sitting here today, I don't remember
11 anything that struck me as particularly
12 egregious with respect to the descriptions of
13 the Public Television category.

14 Q. Okay. So there is -- there is nothing
15 in here that you can recall at this time that
16 would have biased the Horowitz survey estimates
17 in favor of Public Television?

18 A. Not as I'm sitting here today. But,
19 once again, if we took the time and looked back
20 at the questionnaire, I'd have a better -- I'd
21 have a better ability to answer. So if you
22 want to go and look at that Horowitz
23 questionnaire, and let me look back at the
24 wording they used for the program, for the
25 Public Television program, I could form -- have

1 a more informed response.

2 Q. Well, I think we can move on at this
3 point, but if you do want to --

4 A. Given that we only have eight minutes?

5 Q. Given that we have a few minutes left
6 today, but I do want to point out in some of
7 these flaws, in fact, such as the failure to
8 identify non-compensable programming on WGNA
9 that you point out in this paragraph, that
10 would have biased the Horowitz survey results
11 against Public Television, would it not?

12 A. So, once again, right, what is
13 compensable and what is not compensable? So to
14 the extent that Public Television is
15 compensable, right, the provision or the
16 assessment or the inclusion of non-compensable
17 in other program categories is going to draw
18 from that 100 percent pie.

19 Q. So if I am following you, if Public
20 Television's programming is all compensable and
21 that some of the programming that respondents
22 were asked about is non-compensable, then all
23 of the other shares should be increased a
24 little bit, including Public Television; is
25 that right?

1 A. Well, once again, I'd have to go back
2 and look at the question wording, but, you
3 know, the logic flows that if category X is
4 misrepresented with a whole ton of
5 non-compensable programs, it is pulling from
6 all of the other categories.

7 Is it pulling equally? It is -- it is
8 impossible to say. You know, you only can tell
9 -- you can't tell the magnitude and the direct
10 effect on every single one of those programs.
11 You just know you have got a pie, it is being
12 divided up.

13 Once one of those categories gets
14 50 percent erroneously, there is less for all
15 the others. How that then should get
16 distributed back to those other program
17 categories, I can't say sitting here today,
18 given their questionnaire.

19 And if you want to think about, you
20 know, the more appropriate way, look to the
21 Bortz questionnaire, especially for the WGNA
22 that clearly identified the compensable
23 programs, and there you have a standard by
24 which you can say: Okay, if we compare WGNA
25 estimates, WGNA-only estimates in Bortz to

1 WGNA-only estimates in Horowitz, you begin to
2 see the impact across all of the program
3 categories of the identification of these
4 compensable programs.

5 Q. But Bortz didn't ask -- provide the
6 information about compensable programming to
7 any of the respondents who also carried Public
8 Television programming; isn't that right?

9 A. That's right, sorry. Thank you for
10 clarifying that.

11 Q. So that issue would actually --

12 A. Right.

13 Q. -- affect Public Television in the
14 same way as in the Horowitz survey?

15 A. Correct.

16 Q. Okay. Well, I see that my eight
17 minutes are up. I could start the next topic.

18 JUDGE BARNETT: This is probably a
19 good place to break. We will be at recess
20 until 9:00 o'clock in the morning.

21 And, counsel, have you exchanged
22 information about the next witness on deck and
23 the exhibits that are to be used with that
24 witness? Or those witnesses?

25 MR. ERVIN: I believe we have, Your

1 Honor. After we finish Ms. Mathiowetz's
2 testimony, Ms. Marci Burdick from Commercial
3 Television Claimants will be on for a
4 scheduling issue.

5 JUDGE BARNETT: Thank you for being --
6 extending those professional courtesies. We
7 appreciate it.

8 MR. GARRETT: And after Ms. Burdick,
9 we will go with Mr. Singer. He will be our
10 next witness then.

11 JUDGE BARNETT: Okay.

12 MR. GARRETT: We hope to get to him
13 tomorrow, if not he will be the next day.

14 JUDGE BARNETT: We will press ahead
15 with all due speed. Okay. We are at recess
16 then until 9:00 o'clock in the morning.

17 (Whereupon, at 4:29 p.m., the hearing recessed,
18 to reconvene at 9:00 a.m. on Wednesday, February 21,
19 2018.)

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) Docket No.

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4 IN THE MATTER OF:)

5) Docket No.

6 DETERMINATION OF CABLE) 14-CRB-0010-CD

7 ROYALTY FUNDS) (2010-2013)

8 -----X

9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

13 Library of Congress

14 Madison Building

15 101 Independence Avenue, S.E.

16 Washington, D.C.

17 February 21, 2018

18

19 9:18 a.m.

20 VOLUME IV

21

22

23 Reported by: Joe W. Strickland, RPR, CRR, CRC
24 Karen Brynteson, RMR, CRR, FAPR

25

1 door or the side door.

2 MR. GARRETT: And as I understand it,
3 your Honor, it is clear that our witness will
4 not be able to testify as to the effect of the
5 data and changes Dr. Gray made. It is
6 something that we can only raise on
7 cross-examination of Dr. Gray?

8 JUDGE BARNETT: I'm sorry; you're
9 confusing me. Your witnesses can't talk about
10 something that we aren't allowing in the
11 record. I mean they can't critique something
12 in Dr. Gray's analysis that is not in the
13 record.

14 MR. GARRETT: I understand. Thank
15 you, your Honor.

16 JUDGE BARNETT: I think we are
17 continuing to take Dr. Mathiowetz. You had
18 only eight minutes, Mr. Cho.

19 MR. CHO: That's right.

20 JUDGE BARNETT: Dr. Mathiowetz, you
21 may return to the witness stand and you remain
22 under oath.
23 Whereupon--

24 NANCY MATHIOWETZ,
25 a witness, called for examination, having previously

1 been duly sworn, was examined and testified further as
2 follows:

3 MR. CHO: Your Honor, before we begin
4 I would like to move the admission of
5 Exhibit 3011, which is the Reference Guide on
6 Survey Research that Dr. Mathiowetz has
7 testified about, and I believe all the parties
8 have consented to its admission.

9 JUDGE BARNETT: Any objection?

10 MR. GARRETT: No objection, your
11 Honor.

12 JUDGE BARNETT: Thank you. Exhibit
13 3011 is admitted.

14 (Exhibit Number 3011 was marked and
15 received into evidence.)

16 CROSS-EXAMINATION - Resumed

17 BY MR. CHO:

18 Q. Good morning, Dr. Mathiowetz.

19 A. Good morning, Mr. Cho.

20 Q. I would like to pick up where we left
21 off yesterday about the Horowitz surveys. In
22 particular, I wanted to talk about the Horowitz
23 surveys of systems that carried only Public
24 Television on a distant basis.

25 A. I was hoping you were going to go back

1 to the homework assignment that you gave me.

2 Q. Certainly, we can go there.

3 A. Can we go back to the last thing you
4 had in front of us on the visual that was a
5 list of the problems that I had enumerated with
6 respect to the Horowitz.

7 Q. Yes. Is this the slide?

8 A. Yes.

9 Q. Okay.

10 A. You can ask the question. I'll wait.

11 JUDGE BARNETT: I think that's always
12 the best way.

13 THE WITNESS: I write questions,
14 though, for my life, so...

15 BY MR. CHO:

16 Q. Fair point. So do you have any reason
17 to believe that any of the flaws that you've
18 identified in this paragraph 51 of Exhibit 1007
19 would have biased the Horowitz survey results
20 in favor of Public Television?

21 A. You asked me this question yesterday,
22 and with the luxury of a little time to go back
23 and review both my own written Rebuttal
24 testimony, as well as Mr. Trautman's, there is
25 a part of Mr. Trautman's analysis that speaks

1 directly to this last bullet that we talked
2 about with respect to the concentration of
3 burden related to particular respondents having
4 to report for numerous cable systems.

5 If we go back and look at
6 Mr. Trautman's analysis -- I believe it's on
7 page 43 of his written Rebuttal testimony, he
8 talks about one particular respondent who
9 reported for multiple systems and was an
10 outlier with respect to their valuation for
11 Public Television.

12 And in Mr. Trautman's analysis, he
13 showed that when the sensitivity of that
14 outlier -- and I believe he showed that when
15 you remove that person's data, the valuation
16 for Public Television moves by 5 percentage
17 points. That is, it drops by 5 percentage
18 points just related to that one individual's
19 response because of two factors: They're an
20 outlier, and because they contributed a large
21 amount of data due to the way that Horowitz
22 collected their data where a single respondent
23 reported for multiple cable systems.

24 Q. Dr. Mathiowetz, did you identify that
25 particular criticism anywhere in your report?

1 A. Not the calculation. But clearly in
2 this bullet I'm talking about the issues
3 related to the excessive burden. And we talked
4 in my Direct Testimony yesterday about several
5 slides about what that concentration does and
6 how one has to be sensitive to that analysis.

7 But no, I didn't present those
8 particular estimates, because Mr. Trautman had
9 already covered that point.

10 Q. So, Dr. Mathiowetz, do you agree with
11 Mr. Trautman that that system is an outlier?

12 A. Well, once again, right, you're
13 looking -- so as I talked about yesterday, you
14 are looking at a data collection approach in
15 the Horowitz data that has a small number of
16 respondents sometimes reporting for multiple
17 systems.

18 As someone who collects survey data
19 and does estimation, you want to be sensitive
20 to, hmm, I don't want any one person to pull a
21 regression line or pull an estimate just
22 because of the nature of their response. So
23 why don't you look for outliers?

24 What's an outlier; right? You look
25 across the data. That is a subjective

1 viewpoint that you have to make. In
2 Mr. Trautman's analysis, he looked and this one
3 respondent's valuation for Public Television
4 was four times the mean for everybody else in
5 the Horowitz data. He labeled that an outlier.

6 So I'm just reporting back to you;
7 right? Different people can decide what an
8 outlier is, but my point that I wanted to make
9 sure that we came back to is that because of
10 the concentration of data in the Horowitz --
11 and because of another case that I talked about
12 yesterday which didn't have to do with Public
13 Television, but had to do with the evaluation
14 of syndicated shows; right -- any one person
15 who is reporting, for instance, for 10, 20, 30,
16 40 systems, can have a big impact on the data.
17 And if you are going to bring those data to
18 Court, you have to be sensitive to the fact
19 that, hmm, do I want one person who has
20 contributed a lot to this dataset to move a
21 regression line or to move a particular
22 valuation percentage?

23 JUDGE STRICKLER: Excuse me. Good
24 morning, Professor.

25 THE WITNESS: Good morning.

1 JUDGE STRICKLER: Is there any concern
2 that you might have that there may be a reason
3 why that one person is responsible for so many
4 different cable systems -- we don't know the
5 answer to this, of course -- that they may have
6 superior knowledge as to what is considered
7 valuable, which is why they are entrusted with
8 responding or having responsibility across a
9 number of systems? Since we don't know
10 anything at all about the person, what looks
11 like a statistical outlier may actually be
12 someone who is somewhat differentiated from
13 others who respond with greater knowledge,
14 certainly within the marketplace or the
15 industry, which is why they were entrusted with
16 responding and having responsibility for many
17 cable systems.

18 THE WITNESS: Certainly one has to
19 consider that perhaps those particular systems
20 were unique with respect to their valuation of
21 Public Television. I'm not saying that that
22 person was wrong or right. I'm not saying that
23 they were inaccurate.

24 What I'm trying to put before the
25 court is the need to be aware of the influence

1 of a particular respondent when one respondent
2 is not just reporting for a single cable
3 system, which is what you typically see in
4 datasets, but where one respondent here may be
5 contributing 10 or 20 or almost 30 percent to
6 the dataset.

7 So I can't, of course, sitting here
8 today, say that that person is right or wrong.
9 But I do think it's important to be aware of
10 the differences between the Bortz and the
11 Horowitz data collection effort where you can
12 see this influence of a single individual in
13 the Horowitz data and where you don't have that
14 impact in the Bortz data.

15 JUDGE STRICKLER: Given that we're
16 aware of it -- you have made us quite aware of
17 it, that's terrific -- what are we to make of
18 it, in your professional opinion?

19 THE WITNESS: Well, once again, it is
20 a concern I have with the way that Horowitz has
21 collected the data. You have an alternative
22 data source that isn't plagued by that
23 particular problem and that is the data that
24 was collected by Bortz.

25 JUDGE STRICKLER: Well, when you call

1 it a problem, that sort of assumes the
2 conclusion. What I'm trying to get at is do we
3 have enough information to know it's a problem?
4 It is certainly a statistical outlier, but if
5 we don't know anything about the individual or
6 the cable systems that this individual
7 represents, how are we supposed to know it is a
8 problem as opposed to valuable information.

9 THE WITNESS: So sitting here today, I
10 can't address it. I could certainly go back to
11 the data and try to answer your question, your
12 Honor.

13 JUDGE STRICKLER: But there is nothing
14 in your report that addresses whether we should
15 consider that information as a statistical
16 outlier to be given less weight, or unique
17 information, because this particular individual
18 is not homogeneous with others who responded
19 who didn't represent as many cable systems?

20 THE WITNESS: So in my written
21 Rebuttal testimony, I offer an alternative
22 example that has to do with syndicated shows
23 valuation, rather than Public Television. And
24 once again, looked to see, you know, what that
25 impact is of a particular respondent.

1 But, yes, I cannot -- I'd have to go
2 back and do further analysis in order to make
3 that final determination that you're asking
4 for.

5 JUDGE STRICKLER: Thank you.

6 BY MR. CHO:

7 Q. Dr. Mathiowetz, I guess I wasn't quite
8 clear. Is it your subjective opinion -- I
9 think you said it was a subjective opinion as
10 to whether it is an outlier or not; is that
11 right?

12 A. What is an outlier? There are
13 statistical rules for thinking about what is an
14 outlier; right? So different statisticians
15 bring different rules to the table and say when
16 you have observations that fall more than three
17 standard deviations away from the mean -- there
18 are different standards. There is not one set
19 of standards used by statisticians.

20 So when I'm looking at a dataset, I am
21 looking to see where there are data that are
22 different with respect to thinking about two or
23 three or four standard deviations away from the
24 mean of everybody else. That is subjective.

25 If you put -- when Mr. Harvey comes on

1 the stand, or any other statistician, they all
2 have different rules. And, once again, those
3 rules are based on what -- you know, different
4 approaches to datasets and different ways to
5 think about cleaning the data, different ways
6 to think about sensitivity analysis.

7 JUDGE FEDER: Professor, this
8 particular data point, how many standard
9 deviations does it fall from the mean?

10 THE WITNESS: So once again I'm citing
11 Mr. Trautman's analysis. So I don't know what
12 he used as a cut point. I believe he said it
13 was four times the value, but I'd have to go
14 back -- do we have Mr. Trautman's written
15 Rebuttal testimony that I could just reference
16 to make sure that I'm quoting him accurately.

17 MR. CHO: May I approach the witness?

18 JUDGE BARNETT: Sure.

19 THE WITNESS: Thank you.

20 (Mr. Cho proffers document to
21 Witness.)

22 THE WITNESS: So if you look on
23 page 43 of Mr. Trautman's written Rebuttal
24 testimony, he talks about the single respondent
25 accounted -- he or she alone accounted for

1 between 15 and 23 percent of the responses to
2 the Horowitz survey. Moreover, the allocations
3 to the PTV category for this single MSO average
4 over 45 percent, a level that is more than four
5 times the median Horowitz PTV allocation of
6 10 percent and is a clear outlier in relation
7 to the allocations typically assigned to the
8 category.

9 So his definition there was four times
10 the median, which is a very generous
11 consideration of an outlier.

12 BY MR. CHO:

13 Q. In your opinion, is it appropriate to
14 look at how many multiples of the median a data
15 point falls in to determine whether or not it
16 is an outlier?

17 A. It is a different approach than
18 looking at number of standard deviations, but
19 it's certainly one that is used.

20 Q. Is it only used in the context of
21 normal distributions, or is it used in the
22 context of other types of distributions of
23 data, as well?

24 A. Well, that is why the standard
25 deviations are typically used, rather than just

1 looking at four times a particular data point.

2 Q. Is it true that if a dataset were
3 actually distributed not normally, or that it
4 had high variance, that four times the median
5 might well be within normal?

6 A. No, not four times of the median. You
7 might have variability that is four times
8 within the mean, but not four times within the
9 median.

10 Q. Well, I can give an example. Let's
11 say there were some cable systems that only
12 carried Public Television. How much would
13 those systems have awarded to Public Television
14 on a relative value scale for all of the
15 programming that they carried?

16 A. You mean theoretically?

17 Q. Yes.

18 A. Theoretically, one would think they
19 would report 100 percent.

20 Q. Is it your opinion that that would be
21 an outlier, since it would be four times the
22 median?

23 A. No.

24 Q. So in your opinion do you have any
25 basis to believe that the system that

1 Mr. Trautman identified is an outlier in this
2 dataset?

3 A. No, once again I'm relying on his
4 assessment and I did not look at this
5 particular case specifically. But I just
6 wanted, you know -- you asked me a question
7 yesterday. I wanted to make sure that we
8 circled back and pointed to this particular
9 analysis.

10 Q. I appreciate that. I just want to be
11 clear for the record, but you are not aware of
12 any basis yourself to identify any particular
13 outlier in this dataset with respect to Public
14 Television that should be excluded?

15 A. No, but I do think that -- I think the
16 question you posed to me yesterday was whether
17 any of the bullet points had a potential
18 influence -- the bullet points that I
19 criticized Horowitz, had a potential impact on
20 PTV valuation. That last point, once again I
21 did note yesterday that I haven't looked
22 specifically with respect to PTV. But that
23 last point is one that is of issue with respect
24 to the entire Horowitz dataset and one that
25 needs to be considered, regardless of which

1 program category you are looking at.

2 Q. Now, this isn't exactly like some
3 surveys where you are trying to capture a true
4 value in the population and you are sampling
5 only a very small fraction of that population;
6 right? In this case, in fact, in the largest
7 stratum, Mr. Trautman surveyed 100 percent --
8 or attempted to survey 100 percent of the cable
9 systems in that largest stratum; isn't that
10 right?

11 A. They are -- 100 percent are included.
12 Now we are switching back to the Bortz survey,
13 so 100 percent are sampled in that stratum, but
14 not 100 percent participate.

15 Q. And it is also true for the Horowitz
16 survey, isn't it?

17 A. That's true.

18 Q. So when they are doing that, aren't
19 they capturing variation in the amount of
20 carriage, for example, of Public Television
21 among those systems in that largest stratum?

22 I can rephrase, if you would like.

23 A. Sorry, I --

24 Q. Is it possible that some systems in
25 that largest stratum carry a lot of Public

1 Television and might have a very different
2 valuation of Public Television than other
3 systems in that stratum?

4 A. Why are we focusing just on the four
5 stratum? I mean, there can be variability in
6 the valuation of Public Television for any
7 system, regardless of which stratum they were
8 sampled from.

9 Q. Yes, that is true. But just sticking
10 with the four stratum for now, because both
11 Horowitz and Bortz tried to survey all of those
12 systems, isn't it true that, you know, some of
13 those systems might have valued Public
14 Television more than other systems and carried
15 more Public Television systems than other
16 systems in the same stratum?

17 A. Sure. There could be variation
18 across -- within even the four stratum, yes.

19 Q. And isn't it true that Mr. Trautman
20 and Mr. Horowitz were both trying to capture
21 that variation in the stratum when they
22 conducted their survey?

23 A. Well, the nature of the constant sum
24 question, regardless of which stratum we are
25 talking about, is trying to capture and measure

1 people's valuations, whether it is for Public
2 Television or any of the other program
3 categories. So I don't quite understand your
4 question.

5 Q. I guess what I'm trying to get at is
6 Mr. Trautman and Mr. Horowitz weren't trying to
7 find what the median cable system believed the
8 value of Public Television was, were they?
9 They were trying to determine what all of the
10 cable operators valued Public Television and
11 the other categories at for each of their
12 systems; isn't that right?

13 A. Well, they are trying to determine --
14 I mean, the estimate that is produced is an
15 average across all of the systems within the
16 stratum and then across those four strata.
17 Right? They weren't producing a median, but
18 rather more than of a mean.

19 Q. So if one system actually, you know,
20 was a very large system or represented a lot of
21 data and a lot of subscribers, is that a reason
22 to discard that information?

23 A. No, and I didn't suggest that we
24 discard it. The point that I'm trying to drive
25 home is that between the Horowitz survey and

1 the Bortz survey we have very different levels
2 of responding burden. So if we just think
3 about what you just laid out, both of them in
4 the fourth stratum are trying to interview all
5 of the systems in that stratum; right? So
6 theoretically they are going after -- except
7 for slightly defining the strata differently,
8 they are theoretically going over the same
9 respondents.

10 Now, you have two very different
11 approaches to data collection. One used by
12 Horowitz that asks the respondent to report for
13 multiple systems. So you have non-independence
14 of the observations in this dataset where you
15 have one respondent potentially reporting for
16 multiple systems.

17 In contrast, when you look at the
18 Bortz data collection, going after that same
19 population in that fourth strata, you have a
20 data collection approach where the respondent
21 only has to report for a single cable system at
22 a time. And if that executive was responsible
23 for reporting for more than one cable system,
24 they were interviewed -- the data were
25 collected separately.

1 So in other words, they had a chance
2 to value each of those cable systems
3 separately. Whereas in the Horowitz survey,
4 when they were being queried about the same
5 distant signals for multiple cable systems, it
6 was one interview.

7 Okay. Why is that -- so we have a
8 tension here. I'm not saying that the
9 respondents in the Horowitz survey are wrong if
10 they valued it at 100 percent. I'm asking us
11 to be sensitive to the fact that we have a very
12 different data collection methodology that
13 potentially impacts this dataset. And we can
14 see that impact when we do sensitivity
15 analysis.

16 So Mr. Trautman's done a piece of
17 sensitivity analysis. I've done some looking
18 at a different program category. All that is
19 is trying to say, you know, these two different
20 methodologies going after the very same
21 respondents result in differences with respect
22 to the influence of any one respondent.

23 Q. Let's say hypothetically, just
24 hypothetically, that the decisions at that
25 particular cable operator were made an a very

1 high level as to decide which programs -- I
2 mean, which channels to carry and which distant
3 signals to carry. And the person who made the
4 decision actually decided for all of those
5 different systems him or herself.

6 Now, in that scenario, do you think it
7 is wrong as a matter of survey methodology to
8 ask that person about the valuations of those
9 different categories of programming at
10 different distant signals, or do you think that
11 would be an appropriate methodology?

12 A. My concern isn't whether they have
13 picked the wrong or the right respondent,
14 although theoretically Bortz started from the
15 bottom and Horowitz started at the top. One
16 would have hoped that we had gotten to the same
17 level, but obviously they didn't.

18 My concern is think about what the
19 Horowitz respondent had to do in a single
20 interview. Remember, they're not being asked
21 to report just about the sample cases. They're
22 being asked to report about the universe for
23 which they have oversight of cable systems.

24 Now they're being reviewed, all of the
25 distant signals for those cable systems, and in

1 a single interview they are being asked to
2 evaluate those program categories.

3 So if we think -- I mean, that means
4 they have to give a single valuation, even if
5 they think, Geez -- I won't take Public
6 Television, but just take WGN -- WGN in the
7 Midwest might be more important than WGN would
8 be out in California, but I have to do all WGN
9 in a single interview. So it's an integrated
10 average.

11 It's a very different response task
12 than what you're asking the respondents to do
13 in Horowitz -- I mean in Bortz; sorry. The
14 Horowitz task is much greater than that in
15 Bortz. Sorry.

16 Q. But in my hypothetical scenario,
17 wouldn't that be essentially the job of the
18 person who is answering the survey on a
19 day-to-day basis to take into account all of
20 those different variables and all of those
21 different factors across all the systems they
22 are responsible for?

23 A. Certainly that would be their job.
24 But I assume that when -- once again, I'm not a
25 cable system executive. So I don't know when

1 they go out and purchase these signals if they
2 are thinking about the spread of the country;
3 whether they purchase and think about
4 California separately than the East Coast, even
5 though they all look alike with respect to the
6 distant signals they are carrying.

7 Q. I believe you said a moment ago that
8 there is non-independence between the responses
9 to the Horowitz survey when a respondent is
10 actually answering for multiple systems; is
11 that right?

12 A. I did say that, yes.

13 Q. Is that also true for respondents to
14 the Bortz survey who are answering for multiple
15 systems, that there is non-independence between
16 their answers?

17 A. So once again, the magnitude of that
18 non-independence is many factors greater in
19 Horowitz than it is in Bortz.

20 Q. Do you know if Mr. Trautman took into
21 account that non-independence when he
22 calculated his confidence interval?

23 A. I believe neither Mr. Trautman nor
24 Dr. Frankel took into account that
25 non-independence.

1 JUDGE BARNETT: The Reporter didn't
2 get your question.

3 JUDGE FEDER: Should they have?

4 THE WITNESS: In my viewpoint, they
5 should have. And why is that important? The
6 confidence intervals are a function of
7 clustering or non-independence. And that's,
8 once again, where the magnitude of that
9 clustering in Horowitz, where you have an
10 average of responding for eight or nine
11 systems, has a much greater impact on the
12 confidence intervals you would see from
13 Horowitz, if it was computed correctly, than
14 the impact on the Bortz confidence intervals if
15 you took that into account. Because there you
16 see only executives answering for about 2.2
17 systems per executive.

18 BY MR. CHO:

19 Q. So I believe that you actually offered
20 your own confidence intervals for some of the
21 studies submitted by Program Suppliers, but you
22 did not submit any corrected confidence
23 intervals for the Bortz survey; is that
24 correct?

25 A. That's correct.

1 Q. And you're not aware of anything in
2 the record that would suggest what the accurate
3 confidence intervals would be for the Bortz
4 survey?

5 A. No, I do not believe there is one in
6 the record.

7 Q. And just to sort of clarify another
8 aspect of that, even if those confidence
9 intervals were corrected for the Bortz survey,
10 that would not take into account any bias that
11 may be attributable to the omission of PTV-only
12 systems; is that right?

13 A. Right. The confidence intervals that
14 would be based on the data that were collected,
15 as Mr. Trautman has clearly said, the
16 100 percent PTV were not included in their
17 interviews.

18 Q. Thank you. Okay. So I'm going to
19 return to my outline, unless you have anything
20 else to add.

21 So unlike the Bortz surveys, the
22 Horowitz interviewers actually called systems
23 that carried only Public Television signals;
24 isn't that right?

25 A. That is correct.

1 Q. And the Horowitz interviewers asked
2 those respondents to estimate the relative
3 value of all of the programs broadcast on those
4 PBS stations; isn't that right?

5 A. They did, yes.

6 Q. Now, in your opinion, was that
7 question confusing?

8 A. To me, looking at that question and
9 asking someone to make a relative valuation of
10 one object is like: Okay, you're telling me it
11 has to sum to 100 percent, it has got to be
12 100 percent.

13 So when you ask that question and they
14 only have a single distant signal, I wonder
15 what those respondents thought they should be
16 thinking about. And, you know, I didn't get to
17 debrief those respondents. The data that is
18 produced by Horowitz suggests that many
19 respondents didn't report 100 percent for that
20 category. So they may have not understood the
21 task when asked that.

22 Q. I believe you told Judge Feder
23 yesterday you thought maybe those responses
24 were uninformative; is that right?

25 A. I don't remember the term I used.

1 Q. Well, would you say those responses
2 are uninformative?

3 A. I don't know if I would call it
4 uninformative; right? Theoretically, they
5 should be answering 100 percent. Several of
6 the respondents in the Horowitz survey, when
7 asked about only PTV, answered less than
8 100 percent. I'm not quite sure what to make
9 of that.

10 Q. Isn't it true that one of the
11 advantages of conducting an interview for a
12 constant sum survey is that interviewers can
13 actually prompt respondents if the valuations
14 are not adding up to 100 percent?

15 A. That is one of the advantages of using
16 interviewers, yes.

17 Q. But the Horowitz interviewers for
18 those Public Television-only systems did not
19 instruct the respondents to make sure that
20 their estimates added up to 100 percent; right?

21 A. If you're going to talk about the
22 Horowitz questions, because there's five
23 different versions, I'd like to at least -- can
24 we look specifically at the question wording
25 used by Mr. Horowitz in his survey for

1 PBS-only? I can't hold all five versions of
2 his questionnaire in my head.

3 Q. Sure. Of course. That's fair. I
4 don't know if you have Mr. Trautman's testimony
5 in front of you, but he quotes a portion of it.
6 Otherwise, we can try and find -- do you have a
7 copy of that?

8 A. I have Mr. Trautman's testimony in
9 front of me.

10 Q. Is it Direct or Rebuttal?

11 A. Direct and Rebuttal.

12 Q. Oh, I think in his Direct Testimony --

13 A. If we are talking about the Horowitz
14 questionnaire --

15 Q. I know. He quotes from it, because --

16 A. I'd actually prefer to see the
17 Horowitz questionnaire, if we are going to talk
18 about the Horowitz questionnaire.

19 Q. I will find you a copy.

20 (Pause.)

21 BY MR. CHO:

22 Q. It appears that the binders do not
23 contain that particular exhibit.

24 A. It just helps me to be able to
25 actually look at a questionnaire when we are

1 talking about it.

2 MR. CHO: Permission to approach the
3 witness.

4 (Mr. Cho proffers document to
5 Witness.)

6 JUDGE BARNETT: Certainly. Do you
7 have the exhibit number on that?

8 MR. CHO: It's 6012.

9 JUDGE BARNETT: Thank you.

10 BY MR. CHO:

11 Q. So my question was the other -- I'm
12 sorry -- the Horowitz interviewers did not
13 instruct the Public Television-only respondents
14 to make sure that their estimate added up to
15 100 percent; is that right?

16 A. I'm trying to find the question.

17 MR. CHO: Mr. Hunziker, if you could
18 pull up that line.

19 BY MR. CHO:

20 Q. I believe in your testimony in
21 paragraph 52 you say, "PBS-only cable system
22 executives were not instructed that the value
23 of their estimate needed to add up to
24 100 percent."

25 A. I did say that. I just want to

1 confirm that I'm looking at the right question.

2 Q. And in your testimony you cite
3 Appendix A, page 36.

4 A. Thank you. Right. I finally found
5 it. Just to be sure. "So considering the
6 value of the programs broadcast only on PBS
7 station to your cable system, what percentage,
8 if any, of the fixed-dollar amount would you
9 allocate for this type of programming?"

10 Right. So they don't specifically ask
11 them -- and I'm just looking through briefly,
12 quickly, to make sure that they don't go back
13 and make sure that it adds up to 100 percent.
14 There isn't a general instruction at the
15 beginning that says: Please write down your
16 estimates and make sure they add to
17 100 percent. But they don't seem to reiterate
18 that at the point of the PBS.

19 Q. In fact, they don't say that to the
20 PBS-only respondents; isn't that right?

21 A. Oh, that's right. Thank you.

22 Q. Now, a constant sum question asks the
23 respondent to divide the fixed sum of 100
24 across two or more categories; right?

25 A. Typically, yes.

1 Q. Typically, or is there --

2 A. Well, this is supposed to be a
3 constant sum question here and we have an
4 example of where they are not asking them to go
5 across. But, yes, if you look in marketing
6 research texts, constant sum questions ask a
7 respondent to parse out points or dollars or
8 something across multiple categories.

9 Q. And the other respondents to the
10 Horowitz survey, besides the PTV-only
11 respondents, the ones who did not carry Public
12 Television, those were instructed to make sure
13 that the valuations did add to 100 percent;
14 right?

15 A. Correct.

16 Q. So not only is this question maybe
17 confusing, as we talked about earlier, but
18 isn't this question different from the constant
19 sum question that was asked of all the other
20 respondents?

21 A. Well, in the sense that the nature of
22 the task is different between asking about a
23 single category versus multiple, and then the
24 reiteration to follow up and add to 100, yes.

25 Q. Now, I'd like to ask you next about

1 how the Bortz survey handled systems that
2 carried only Public Television signals on a
3 distant basis. We just talked about the
4 Horowitz and we will switch gears to the Bortz.

5 Do you agree with Mr. Trautman that
6 there needed to be some kind of adjustment to
7 the Bortz survey shares because the Bortz
8 survey discarded Public Television-only
9 systems?

10 A. Yes, I do agree that, because they
11 were excluded from being interviewed, they have
12 no representation in the Bortz survey
13 estimates. And so, yes, some adjustment is
14 appropriate.

15 Q. Yesterday, I think you criticized
16 Dr. Frankel's adjustments to the Bortz survey
17 shares; right?

18 A. I did.

19 Q. But you didn't offer any criticisms,
20 as I recall, of Ms. McLaughlin's approach; is
21 that right?

22 A. I did not, no.

23 Q. And I believe yesterday you testified
24 in response to -- I believe it was a question
25 from Judge Feder -- that before you could

1 endorse Mr. McLaughlin's approach fully, you
2 would have to spend some more time to make sure
3 you understood her methodology; is that right?

4 A. I think what I said was I understand
5 -- from reading her written Rebuttal testimony
6 or Direct, I can't remember which, you can
7 clearly see that Ms. McLaughlin takes into
8 account a response rate by strata similar to
9 what was realized in Bortz. The piece of
10 information that I'm missing with respect to
11 Ms. McLaughlin, as I sit here today, is I do
12 not know if she sampled at 100 percent the
13 PBS-only or if she sub-sampled within strata
14 for the Public Television stations. And that
15 is a missing piece of information that I could
16 not -- I would actually have to go look at her
17 Excel spreadsheets and have not done before
18 coming to Court.

19 Q. To be clear, were you provided with
20 Ms. McLaughlin's data and her testimony that
21 fully details her method?

22 A. Yes, but if I remember correctly --
23 right -- when we started off my Direct: Why am
24 I here; right? I'm a survey methodologist. So
25 I came looking at the surveys and the survey

1 data. There is a lot of economics experts that
2 I did not focus in on with respect to my
3 testimony.

4 Q. But you did look at the adjustments
5 that were performed by Dr. Frankel; right?

6 A. Well, Dr. Frankel, right, I had
7 already commented on in my written Rebuttal
8 testimony and so had been looking at his
9 estimates already. And, therefore, you know,
10 he did in his filing in February, I did look at
11 his, because that was part of the --

12 Dr. Frankel was the person who did the
13 estimations in the survey. So to me,
14 Dr. Frankel's and Mr. Horowitz' testimonies are
15 linked to the survey collected by Mr. Horowitz.

16 Q. As you sit here now, are you aware of
17 any aspect of Ms. McLaughlin and
18 Dr. Blackburn's adjustment of the Bortz survey
19 shares that in your opinion is inappropriate or
20 incorrect?

21 A. Once again, as I've already testified,
22 I don't know how they populated it. But
23 from -- other than that, the fact that they
24 took into account the response rate that was
25 realized in Bortz in their revised estimation

1 and their augmentation of the Bortz, it seems
2 appropriate.

3 Q. Let's talk about another -- a
4 different aspect of the Bortz survey. In your
5 written testimony you talk about Dr. Shari
6 Diamond's Reference Guide on Survey Research;
7 is that right?

8 A. I do.

9 Q. In fact, you use it as the framework
10 to review the methodology of the Bortz survey?

11 A. I do.

12 Q. In your opinion, is Dr. Diamond's
13 Reference Guide on Survey Research a reliable
14 authority on survey research?

15 A. There are those buzz words that
16 lawyers like to ask me about. Is it a -- it
17 offers, I think, a very sensible way to
18 approach a survey and look at sampling, at the
19 design of a questionnaire, and implementation,
20 and puts forth the key questions that are
21 useful to address in thinking about either
22 designing a survey or evaluating a survey.

23 It is not, you know, a piece of
24 empirical literature. It is not a textbook on
25 survey research. But it offers a nice, quick,

1 handy guide to what are the key points. What
2 was the population of interest, et cetera. And
3 the way it frames it by asking it in questions,
4 I think, is very useful.

5 Q. I'm not trying to be difficult, but
6 are you saying it is not a reliable authority
7 on survey research?

8 A. I don't mean to parse words with you,
9 but what do you mean by reliable? Does it
10 offer scientific evidence? No. It summarizes
11 the literature. She is not a survey
12 researcher, but is drawing upon the survey
13 research literature in putting together that
14 chapter.

15 So I have relied upon it -- in the lay
16 term of "relied," not the statistical
17 reliability -- I would say, yes, I rely on it.

18 Q. Okay. Thank you.

19 MR. CHO: Permission to approach the
20 witness.

21 JUDGE BARNETT: Certainly.

22 MR. CHO: For the record, I'm handing
23 the witness Exhibit 3011.

24 JUDGE BARNETT: Thank you.

25 THE WITNESS: Can I just interject

1 something? I wrenched my back sometime between
2 yesterday and here. Can I just stand up for a
3 couple of minutes?

4 JUDGE BARNETT: Absolutely.

5 THE WITNESS: Thank you.

6 JUDGE BARNETT: At any time for any
7 length of time. And that goes for anybody else
8 in the room. There have been times in the past
9 when I have put a lectern on the bench so I
10 could stand for a while. So absolutely.

11 THE WITNESS: Thank you. I will sit
12 soon.

13 BY MR. CHO:

14 Q. Dr. Mathiowetz, one of the questions
15 that the Reference Guide for Survey Research
16 asks is: What is the evidence that nonresponse
17 did not bias the results of the survey? Isn't
18 that right?

19 A. Can you direct me to the specific page
20 that you're looking at, Mr. Cho?

21 Q. Yes.

22 MR. CHO: Mr. Hunziker, if you could
23 pull up Slide 11.

24 BY MR. CHO:

25 Q. I believe it is quoted in your

1 testimony at paragraph 19, but I will also
2 point you to the reference now. I believe it
3 is page 3983, JSC 3983.

4 A. You mean page 398?

5 Q. It's 383. Sorry, there are two sets
6 of page numbers. One is the one provided by
7 Counsel for Sports Claimants and then the other
8 is on the document itself.

9 A. Thank you. Now, what was your
10 question?

11 Q. My question is just the Reference
12 Guide asks: What is the evidence that
13 nonresponse did not bias the results of the
14 survey? Is that right?

15 A. That's right.

16 Q. And did you address that question in
17 your Direct Testimony?

18 A. I have to go back and look at it. I
19 certainly, obviously raised it in my Direct
20 Testimony.

21 MR. CHO: Mr. Hunziker, could you pull
22 up -- thank you.

23 BY MR. CHO:

24 Q. So this is paragraph 22 from your
25 Direct Testimony, Exhibit 1006. Would you say

1 that this paragraph addresses nonresponse bias?

2 A. Well, what I'm trying to do in this
3 paragraph is to simply state that nonresponse
4 bias is a function both of nonresponse rates,
5 as well as the difference between respondents
6 and nonrespondents.

7 And in part of what I'm looking at
8 here is that the Bortz survey had, for the
9 industry, a relatively high response rate. And
10 more importantly, that response rate of
11 approximate 50 to 55 percent across the years
12 was achieved across the four strata. That is,
13 they didn't have differential nonresponse.

14 Where you would worry about
15 nonresponse bias would be, for instance, if we
16 had -- I'll take an egregious example -- very
17 high response rates to the low strata, like
18 100 percent, and very low response rates to the
19 cable systems that were in the richest or the
20 fourth strata.

21 Q. So one way you can see whether there
22 is potential response bias is if there are
23 differences between the sample of respondents
24 in what -- I guess not the sample, the
25 respondents and the nonrespondents?

1 A. Well, you don't have data on
2 nonrespondents typically; right? And so you
3 have to look to whatever metrics you have.
4 Now, once again I think Mr. Trautman has done
5 some analysis related to this to look at how
6 the universe of the sample of the Bortz
7 respondents matched to the full universe and
8 sees a fairly high correspondence, which
9 suggests a lack of nonresponse bias.

10 Q. We'll get there in a second. But
11 focusing on your Direct Testimony, you wrote
12 with respect to nonresponse bias that, "In
13 addition, high response rates were achieved
14 consistently across the strata, thereby
15 reducing concerns relating to differential
16 nonresponse." Is that right?

17 A. That's what it says here, yes.

18 Q. So does that mean in your opinion that
19 nonresponse did not bias the Bortz survey
20 results?

21 A. It gives us reenforcement that
22 nonresponse bias -- that nonresponse was not
23 differential and, therefore, you see equal
24 representation across the four strata. That
25 does not completely wipe out the potential for

1 nonresponse bias, no.

2 Q. Was there any other evidence you
3 relied on when you were preparing your Direct
4 Testimony to conclude that nonresponse bias may
5 not have biased the results of the Bortz
6 survey?

7 A. I don't think I offered any.

8 Q. I believe you said that the Bortz
9 survey's response rate was between -- well, was
10 in the 50s; is that right?

11 A. Across the four years, yes.

12 Q. Is it possible for there to be
13 nonresponse bias even for surveys with higher
14 response rates than that?

15 A. It almost sounds like you found my
16 lecture notes on nonresponse bias. So you know
17 you're looking at -- when you think about
18 nonresponse bias you are thinking about a
19 multiplicative function. That is, the
20 nonresponse rate times the difference between
21 the respondents and nonrespondents.

22 You worry about that most of all when
23 you think that there is a potential motivation
24 that causes respondents with certain
25 characteristics to not participate. So bear

1 with me for my little example.

2 The Federal Government at one point
3 wanted to do a survey related to exposure to
4 risks for HIV. It wanted to have a very high
5 response rate. This is back in the 1980s.

6 Did a large pilot study. That pilot
7 study had about a 93 percent response rate, so
8 exceptionally high. But it was clear that men
9 most at risk of contracting HIV were least
10 likely to participate. So that the Federal
11 Government decided to cancel the survey that,
12 even though it had an exceptionally high
13 response rate, that the nature of the
14 difference between the respondents and the
15 nonrespondents was such that the population
16 that was most of interest was not going to
17 participate.

18 Okay. So now let's go back to the
19 Bortz survey; right? Interviewer is calling:
20 I need to talk to someone who is in charge of
21 purchasing or is in charge of programming.
22 Right? There is no reason, thinking from a
23 behavioral perspective, that the respondents
24 would be different than nonrespondents. That
25 is, you know, when survey researchers look at

1 these data or look at any data collection and
2 think about nonrespondents, they have to think
3 about is there a theoretical reason why some
4 people would participate and some people
5 wouldn't?

6 Here there is no reason to think --
7 these are establishments; right? This is not
8 the kind of issue where you are thinking, oh,
9 I'm doing a survey about drunk driving. The
10 people who are not going to respond to my
11 survey when I tell them I'm doing a survey
12 about drunk driving are the very people that
13 not going to respond.

14 Here there is no a priori theory that
15 would say certain respondents would
16 consistently not report to the survey.

17 Q. But there are circumstances in which,
18 even when there is no a priori theory as to why
19 there would be differential response rates,
20 that, in fact, there may be differences between
21 respondents and nonrespondents.

22 A. Right. We're walking into the abyss
23 of the great unknown.

24 MR. CHO: Mr. Hunziker, if you could
25 put up Slide 16.

1 BY MR. CHO:

2 Q. In the Reference Guide for Survey
3 Research, Dr. Diamond states that nonresponse
4 often is not random. Do you agree with that
5 statement?

6 A. I do agree with that. And I think
7 that that is a much bigger issue when one is
8 dealing with general population surveys than
9 establishment surveys.

10 Q. Dr. Diamond also notes that there is a
11 Federal Government guideline --

12 MR. CHO: Mr. Hunziker, if you could
13 switch the slide.

14 BY MR. CHO:

15 Q. -- that states, "Plan for a
16 nonresponse bias analysis if the expected unit
17 response rate is below 80 percent." Do you see
18 that?

19 A. I do see that.

20 Q. For the Bortz survey, have you
21 reviewed not just what is in the written
22 report, but also the underlying data?

23 A. I have.

24 Q. And did you examine that data to see
25 if there are differences between the

1 respondents who completed the survey and the
2 universe of cable systems?

3 A. I did some analysis with respect to
4 that, but not a great detailed analysis.

5 Q. What specifically did you do?

6 A. I think I was mostly focused on
7 looking to see if the response rates within
8 strata varied and how they varied across years.

9 Q. You're familiar with the term "distant
10 subscriber instances"?

11 A. Yes.

12 Q. What are distant subscriber instances?

13 A. DSEs, you mean? So this is --

14 Q. I'm sorry; not DSEs. Distant
15 subscriber instances; Not distant signal
16 equivalents. I know this proceeding has a lot
17 of lingo.

18 A. There is a lot of lingo here. I
19 don't -- I know what DSEs are in my head. I
20 know I have come across DSI. But sitting here
21 today, I don't think I want to define it.

22 BY MR. CHO: Mr. Hunziker, could you
23 put up Slide 18.

24 BY MR. CHO:

25 Q. You talk about distant subscriber

1 instances in your testimony. Does that ring a
2 bell?

3 A. When I had the benefit of all of my
4 documents in front of me, yes.

5 Q. Is it fair to say that distant
6 subscriber instance is one distant signal
7 received by one cable subscriber?

8 A. I believe that is how I interpreted it
9 in putting together my report, yes.

10 Q. Did you think to compare any
11 categories of distant subscriber instances
12 between the respondents to the Bortz survey and
13 the universe of all cable systems to see if
14 they're being over- or underrepresented?

15 A. I didn't consider doing that analysis,
16 no.

17 Q. So unlike for the Bortz survey, you
18 did look at whether there is bias in the
19 Canadian Claimants Group survey, the
20 Ford-Ringold survey, didn't you?

21 A. Well, I was quite motivated to do
22 that, because they did not -- for the
23 Ford-Ringold survey, they indicated that they
24 selected -- when a cable system executive was
25 being interviewed, they were interviewed about

1 a single distant signal; right? And they
2 indicated -- they didn't tell us how they
3 sampled that, but they did say that there was
4 preference given -- I can't remember exactly
5 the words they used -- preference given to
6 French-speaking signals.

7 Well, that to me -- when someone
8 doesn't describe to me the random process by
9 which they have sub-selected, that to me is a
10 little trigger to say: I need to go look at
11 that. Because why was preference given to
12 French-speaking signals in this case? What was
13 the algorithm used to sub-sample these
14 particular distant signals?

15 I didn't have that same level of
16 motivation, because we didn't see that kind of
17 sub-sampling within Bortz.

18 Q. So in your opinion, is comparing
19 distant subscriber instances between
20 respondents -- let me step back. For the
21 Canadian survey, in fact, you decided to
22 compare the distant subscriber instances of the
23 French language stations among the survey
24 respondents against the universe of Canadian
25 signals; is that right? Looking at

1 paragraph 68?

2 A. Well, looked at. Let me just say I
3 didn't do analysis. These were all tables that
4 had been produced as part of the Canadian
5 Claimants' reports. And so I was just
6 comparing one set of tables to a different set
7 of tables and saw how there was a mismatch in
8 what they had reported.

9 Q. And one of the those tables was about
10 distant subscriber instances?

11 A. Right. And so I'm citing here the
12 Canadian Claimants' reports and one of them
13 does talk about distant subscriber instances.

14 Q. So in your opinion is comparing
15 distant subscriber instances between the
16 respondents and the universe a reasonable way
17 to assess whether there may be nonresponse bias
18 in a cable operator survey?

19 A. Now that you've pointed it out, it
20 might be a reasonable way. But I'd have to
21 think a little further about it. I think what
22 struck me once again with respect to the
23 Canadian Claimants was just how different that
24 DSI was compared to their sample with respect
25 to French speaking.

1 I'd have to -- in order to make that,
2 you know, and go back and do an analysis with
3 respect to thinking about nonresponse, I'd have
4 to really consider issues related to what
5 populates the distant subscriber instances,
6 where those data come from, et cetera,
7 et cetera.

8 Q. So let's just make it hypothetical to
9 be easier and you don't have to worry about
10 diving into all of that data right now.
11 Hypothetically, if there were a difference in
12 Public Television's share of distant subscriber
13 instances among the respondents who completed
14 the Bortz survey, versus the universe of cable
15 systems, would you think it would be possible
16 that the Bortz survey results would be affected
17 by nonresponse bias?

18 A. Where are you -- say that once again.
19 Because you can't produce a DSI out of Bortz;
20 right? You get a proportion related to a
21 valuation.

22 So, I'm sorry, I'm not following -- I
23 mean, the analysis that I did here is with
24 respect to French-speaking systems.

25 Q. Let me step back and maybe clarify the

1 language. So a distant subscriber instance is
2 an instance of one cable subscriber getting one
3 distant signal. So, for example, if a cable
4 system has 20 subscribers and they each get two
5 distant signals, that is 40 distant subscriber
6 instances.

7 A. Okay. I got that.

8 Q. And let's just say one of them is a
9 Public Television station. Then you would say
10 there were 20 Public Television distant
11 subscriber instances for that cable system and
12 20, maybe, Commercial distant subscriber
13 instances for that cable system. And we
14 actually don't need to use a survey to get
15 that. That is all filed here at the Library of
16 Congress. So we actually have information
17 about the distant subscriber instances even
18 without surveying anybody.

19 So my hypothetical is if there is a
20 difference between the Public Television share
21 of distant subscriber instances among the
22 respondents who completed the survey, the Bortz
23 survey, versus the universe of cable systems,
24 would it be possible that the Bortz survey
25 would be affected by nonresponse bias?

1 A. Thank you for your clarification. I
2 see -- you're looking at whether there is, at
3 the cable system level, the nonresponse as
4 opposed to the valuations. Yes, you could do
5 that analysis and look at potential nonresponse
6 bias.

7 Q. All right. So I'm going to dive a
8 little bit more into your criticism of the
9 Canadian Claimants Group Ford-Ringold survey --
10 unless you would like to take a break.

11 JUDGE BARNETT: Before we dive, let's
12 take a 15-minute recess.

13 (A recess was taken at 10:31 a.m.,
14 after which the trial resumed at 10:50 a.m.)

15 JUDGE BARNETT: Mr. Cho, you may dive.

16 MR. CHO: Diving right in.

17 BY MR. CHO:

18 Q. On page 64 of your written Rebuttal
19 testimony on the screen, you wrote that, "The
20 overrepresentation of French-speaking channels,
21 coupled with the unreliable estimates, rendered
22 the data from the Ford-Ringold study to be of
23 little to no utility with respect to the issue
24 of relative market value of Canadian
25 programming on Canadian distant signals." Is

1 that still your opinion?

2 A. That is.

3 Q. When you say unreliable estimates, are
4 you talking about the confidence intervals
5 on --

6 A. I am.

7 Q. Sorry -- on page 33 of your written
8 Rebuttal testimony?

9 A. Yes, I am.

10 Q. And that is what is up on the slide
11 here?

12 A. Yes.

13 Q. So those confidence --

14 A. Those charts.

15 Q. Sorry. So those confidence intervals,
16 those are for the valuation of Sports
17 programming on Canadian signals; right?

18 A. Yes, those are.

19 Q. And now I'm just going to round a bit
20 to make the math simpler, but the widest of
21 those intervals was roughly between from about
22 10 percent to about 30 percent; right? It's
23 that right column.

24 JUDGE STRICKLER: You are rounding the
25 year 2013?

1 MR. CHO: Yes, well, any of them. I
2 guess one is 9 to 33, but I'm just rounding --

3 THE WITNESS: 2012 looks to be the
4 widest, but I think in my Rebuttal -- can I
5 just check my Rebuttal report, because I think
6 there is a table for --

7 (Witness examining document.)

8 THE WITNESS: I just wanted to check
9 something, thank you.

10 BY MR. CHO:

11 Q. No problem. So if I'm rounding to the
12 nearest 10, just to to make my math a little
13 easier, is it fair to say that the widest
14 confidence interval in that right column is
15 about 10 to about 30 percent?

16 A. From 9 to 33 percent.

17 Q. Yes.

18 A. Well, you know, we are arguing about
19 small percentage points here in this hearing.
20 So in 2012, that confidence interval goes from
21 8.8 to 33.3.

22 Q. Yes, thank you. So let's just assume
23 hypothetically -- definitely only for the
24 purposes of discussion -- all of the
25 programming on Canadian stations is worth

1 somewhere around 5 percent of the total royalty
2 pool.

3 MR. CHO: And Mr. Hunziker, can you
4 show the next slide, so we can keep track of my
5 math.

6 BY MR. CHO:

7 Q. If I am doing the math right, would
8 that mean that the confidence intervals for the
9 Sports programming on Canadian stations would
10 amount to approximately half a percentage point
11 and 1-1/2 percent points?

12 A. To calculate a confidence interval you
13 have to know the sample size, as well as -- so
14 what sample size are you assuming in order to
15 make these computations.

16 Q. I'm sorry; I'm not trying to calculate
17 a confidence interval. I'm just taking your
18 confidence interval -- I understand I may be
19 rounding too much, but let's say it's 9 to 33.
20 But my point is, I guess, if the Canadian
21 station programming were worth 5 percent of the
22 total royalty pool -- which it is not -- but if
23 it were, then the confidence interval for the
24 Sports share between around 10 percent to
25 30 percent would mean that the Canadian

1 stations's Sports programing is between about a
2 half of a percent and 1-1/2 percent; is that
3 right?

4 A. I'm sorry; I'm not trying to be dense;
5 I'm just trying to follow what you are doing
6 here.

7 Q. Sorry. If all the Canadian
8 programming is worth about 5 percent of the
9 royalty pool, so the Sports programming is
10 somewhere between 10 percent of that and
11 30 percent of that, so --

12 A. All the Canadian is 5 percent.

13 Q. Right -- would be half a percentage
14 point and 30 percent of the Canadian
15 programming would be 1-1/2 percentage points;
16 is that right?

17 A. Right. All you are doing is taking 10
18 to 30 percent of 5 percent to multiply this.

19 Q. Exactly.

20 A. Got it. Okay. I'm with you now.
21 Sorry.

22 Q. So another way to say that would be
23 that the Canadian Sports programming would be
24 worth 1 percentage point plus or minus half a
25 percentage point. Is that fair to say? In

1 this hypothetical?

2 A. One -- let me just back up. So what
3 you're really saying here in the slide is that
4 Sports share of Canadian stations' programing
5 is a point estimate of about 20 percent and it
6 ranges from 10 to 30 percent; right?

7 Q. Right. Based on your Table 3.

8 A. Okay. That math looks reasonable.

9 Q. So is it your view that that is such a
10 wide confidence interval that it makes the
11 study of little to no utility in the context of
12 this proceeding?

13 A. Certainly I hadn't looked at this kind
14 of calculation, but when you think about it
15 from a statistical viewpoint, right, I made my
16 decision and my declaration in my written
17 Rebuttal based on the confidence intervals that
18 I produced in Table 3; right? Those are
19 extremely -- I mean there is a very small
20 sample size in the Canadian survey, in the
21 Ford-Ringold survey. That renders very wide
22 confidence intervals. They are what they are.

23 Q. I guess I'm just trying to understand,
24 does that mean that in the context of this
25 proceeding, that that level of the confidence

1 interval, which I think we established is about
2 a percentage point, that that is so wide as to
3 make the study of little to no utility in this
4 proceeding?

5 A. Well, it's a percentage point when you
6 take 10 percent of a 5 -- I mean in your
7 hypothetical. But let's just look at Table 3;
8 right?

9 In previous rulings, Judges have
10 looked to the confidence intervals to be
11 informative, because of issues with respect to
12 thinking about point estimates; right? So
13 first and most important, in the Ford-Ringold
14 report they didn't report standard errors; they
15 reported standard deviations. I thought it was
16 useful for there to be a translation of those
17 standard deviations into standard errors, so we
18 are comparing apples to apples.

19 Now when I look at these confidence
20 intervals and compare them to the confidence
21 intervals one sees in the Bortz survey, you see
22 much tighter confidence intervals, driven in
23 part by the size of the sample and the nature
24 of the sample design in Bortz.

25 Q. Now, just according to Mr. Trautman,

1 doesn't the Bortz survey have even wider
2 confidence intervals than 1 percentage point?

3 A. Well, yes, we can look at those
4 standard errors and they are wider than
5 1 percentage point.

6 Q. Okay. Let's come back to the first
7 part of your sentence in paragraph 62.

8 BY MR. CHO: Mr. Hunziker? Thank you.

9 BY MR. CHO:

10 Q. When you say, "The overrepresentation
11 of French-speaking channels," are you referring
12 to your statement that French language stations
13 accounted for only 21 percent of the distant
14 subscriber instances, and which is less than,
15 as you pointed out, the 36 to 55 percent of the
16 French language systems in the Ford-Ringold
17 sample?

18 A. Right. So in the Ford-Ringold survey,
19 you have overrepresentation of the
20 French-speaking stations.

21 Q. So again hypothetically, if the
22 Canadian station programming is valued on the
23 order of 5 percent of the total royalty pool,
24 would it be fair to say that that
25 overrepresentation that you identify would have

1 an effect of, at most, approximately
2 1 percentage point of the total royalty pool?

3 A. Well, where are you getting this
4 5 percent from? Is this from the Canadian or
5 from Horowitz or from Bortz? Because they all
6 have very different standard errors around
7 them. So we should really talk about -- if we
8 are going to talk about Canada and the Canadian
9 channels, let's look at the Bortz and Horowitz
10 estimates that are about .2 to 2.2 with
11 standard errors around those point estimates.
12 So none of those estimates come in at 5 percent
13 of the royalty pool.

14 Q. I agree. I'm happy to use the figure
15 that they are at 2 percent. But --

16 (Laughter.)

17 A. They are sitting very close to me, so
18 I have to be careful.

19 (Laughter.)

20 Q. I guess my point is that even if the
21 Canadians were as large as 5 percent, which
22 sounds like you and I agree maybe they
23 shouldn't be, then 20 percent of that, versus
24 40 percent of that, would be a 1 percentage
25 point difference, roughly?

1 A. You know, I hate doing math on the
2 stand.

3 Q. Sorry.

4 A. And so I would like to reserve my
5 judgment about your computation, because you're
6 taking a point estimate with a standard error
7 and now you are multiplying it by something
8 and, sitting here today at 11 a.m., I don't
9 know if the translation of that standard error
10 just is a direct linear function along your
11 compensations.

12 JUDGE BARNETT: Public math is never
13 advised, not even for statisticians.

14 THE WITNESS: Without my calculator
15 and my flip chart.

16 BY MR. CHO:

17 Q. Absolutely fair. Just to be clear,
18 though, I'm no longer asking about the standard
19 errors or the point estimates of your Table 3.
20 I'm just talking about this overrepresentation
21 point where you say that the French language
22 stations accounted for roughly 20 percent of
23 the distant subscriber instances, but then that
24 French language systems accounted for 30 to 55,
25 or let's just say 40 percent of the sample.

1 So you know, that would be -- if the
2 Canadians were as high as 5 percent in that
3 world, then, you know, even if all of the
4 French stations gave 100 percent to the
5 Canadian group and all of the non-French
6 language stations give zero percent to the
7 Canadian, even that extreme example, the
8 biggest difference you would get from this
9 nonresponse bias -- I mean from this
10 overrepresentation bias is a bias of
11 1 percentage point of the total royalty pool;
12 is that right?

13 A. Well, it's compounded by the fact that
14 for the Canadian survey they are only
15 interviewing about one distant -- let's just
16 walk through this; right? Let's just round
17 this to 20 percent; right?

18 Q. Yes.

19 A. And so we see and we know from the
20 survey about 40 percent of them are distant
21 signals -- I mean 40 percent are French
22 speaking. So that is about a 20 percentage
23 point difference, but 100 percent difference.
24 So you know it's -- this is why we have lies,
25 damn lies, and statistics; right?

1 So you have almost 100 percent more
2 present in the survey than you do in the
3 population. How do I get that? You get
4 40 percent minus 20 percent is 20, divided by
5 the 20 that is in the population. Okay.

6 So if you have an inflation of
7 100 percent represented in the sample and now
8 in your extreme point -- right -- if all of the
9 people who are in the sample are valuing the
10 Canadians at 100 percent and all of them who
11 weren't included, because they weren't French
12 speaking, would have valued it as zero; right?
13 So now I have to do -- so now that's 20 percent
14 times 100 percent. You've got that figured
15 out. So that's 20 percent.

16 Q. 20 percent of the entire Canadian
17 share, which in this hypothetical would be
18 5 percent, but it probably should be some other
19 number?

20 A. Yes.

21 Q. So I guess I just want to put that all
22 together. Is it your opinion that a constant
23 sum survey with a confidence interval of
24 approximately 1 percentage point, or maybe
25 less, and overrepresentation bias of

1 approximately 1 percentage point, or maybe a
2 little less, is of little to no utility in the
3 context of this proceeding?

4 A. Those aren't the levels that we're
5 seeing. Let's just take the survey at its face
6 value. We have almost 100 percent
7 overrepresentation of French-speaking systems.
8 That's the survey. Forget, you know, what the
9 impact is. When you look at the Ford-Ringold
10 survey with about a 30 to 55 percent -- I can't
11 remember the numbers exactly -- of
12 French-speaking systems, when their own data
13 say that about 21 percent of the distant
14 subscriber instances are French, right, that is
15 a significant bias in that representation.

16 Then let's look at the standard errors
17 that come from the Ford-Ringold survey in and
18 of themselves. They are wide standard errors.
19 So as you look at the point estimates from that
20 survey, you have to consider those confidence
21 intervals.

22 Now, you're extrapolating it up to
23 kind of the broader world then and trying to
24 apply that then to some other estimate. So I
25 don't want to agree with your conclusion, even

1 though you're pointing this math out; right?
2 If you are going to evaluate the Ford-Ringold
3 survey, then you have to look at the standard
4 errors that are produced from that survey.

5 Q. I guess I thought I was including
6 those. But I guess my question really, you
7 know, when the Judges are trying to look at the
8 entire universe of data out here, if there is a
9 wide confidence interval -- 10 to 30 percent I
10 would say in the abstract is very wide for a
11 confidence interval -- but it only pertains to
12 a very small amount of the total royalty pool,
13 does that still render that study of little to
14 no utility in this proceeding?

15 A. I'm not going to speak for the Judges.
16 I am coming at this as a survey methodologist.
17 So the utility of this survey, when you have
18 such small sample sizes, to me renders it
19 unreliable. They obviously have to make their
20 own decision about the data.

21 MR. CHO: No further questions.

22 JUDGE BARNETT: Mr. Olaniran, are you
23 the next up?

24 CROSS-EXAMINATION

25 BY MR. OLANIRAN:

1 Q. Good morning, Dr. Mathiowetz. My name
2 is Gregory Olaniran, and I am counsel for the
3 Program Suppliers.

4 A. Good morning.

5 Q. You didn't have any role in the
6 development of the Bortz surveys that are being
7 used in this proceeding, did you?

8 A. No, I did not.

9 Q. And you were asked to review the Bortz
10 surveys and render an opinion on the survey
11 methodology; is that correct?

12 A. Yes, after the data had been
13 collected.

14 Q. And the factual information about the
15 2010 through '13 Bortz surveys on which you
16 relied for your opinion, where did that come
17 from?

18 A. I'm sorry; could you repeat the
19 question?

20 Q. All of the facts that you relied on
21 for your opinion with regard to the Bortz
22 surveys, where did that information come from?
23 Just Mr. Trautman, or the Bortz --

24 A. The reports of the Bortz survey, as
25 well as my own professional knowledge about the

1 field. But you are saying where did I get my
2 information about the Bortz survey? Is that
3 the question?

4 Q. Yes.

5 A. So there is a report that was part of
6 Mr. Trautman's Direct written testimony and
7 that served as the basis for my -- the
8 foundation for my review.

9 Q. Now, and you reviewed all of the
10 template questionnaires attached to
11 Mr. Trautman's Direct Testimony; is that
12 correct?

13 A. Yes, I did.

14 Q. Okay. Did you review all of the
15 versions of -- all the different versions of
16 the survey?

17 A. Do you mean the ones that were
18 produced for 2010 to 2013?

19 Q. Actually, I was referring to the
20 templates. There are several different
21 versions of each survey.

22 A. There are two -- there are two major
23 templates for every single year and I've
24 reviewed those. There is one for WGN-only and
25 then there is for other systems.

1 Q. Are you aware that, with respect to
2 the two categories of templates, they had
3 additional versions within each category?

4 A. Well, absolutely. There are -- I mean
5 if we look at the question wording, it varies
6 depending upon the nature of the distant
7 signals.

8 Q. Okay. Did you also review the
9 completed questionnaires in your preparation?

10 A. I have looked at some, but not every
11 single completed questionnaire.

12 Q. Do you recall how many you looked at
13 for each year?

14 A. Probably 50 to 100.

15 Q. For each year or --

16 A. Yes.

17 Q. -- for years.

18 A. Yes, each year.

19 Q. And did you perform any statistical
20 tests regarding the validity or the reliability
21 of the results?

22 A. So with respect to thinking about the
23 validity -- right -- we have, looking at the
24 Bortz instrument, an instrument that is a
25 modified version of the constant sum question

1 that's been used and relied upon in proceedings
2 in the past. From that perspective, it has
3 already established itself with respect to
4 construct validity.

5 So, no, I reviewed the questionnaire
6 and looked at it from that perspective of
7 construct validity, does it measure what it
8 purports to measure? So --

9 Q. So -- I'm sorry. Please finish.

10 A. So with respect to reliability, there
11 are no data from the Bortz survey that I could
12 use to measure reliability and, therefore,
13 didn't undertake that.

14 Q. If I understand your response with
15 regard to validity, you actually did not
16 conduct any tests with regard to validity. You
17 relied on previous findings with regards to the
18 Bortz surveys; is that correct?

19 A. That's correct.

20 Q. And then with regards to --

21 A. Can I finish --

22 Q. Please.

23 A. -- my response? So, when you think
24 about validity, and as a statistician thinking
25 about validity or as a psychologist thinking

1 about validity, there are different ways to
2 measure validity. And one is to think about,
3 well, what is the true value out there? Well,
4 we don't know what the true value is. That is
5 why we are doing this survey.

6 So to think that there is an analysis
7 that one can just go out and conduct with
8 respect to validity is, you know, that doesn't
9 exist.

10 So you have to think about the other
11 ways to think about assessing validity. One
12 that is used a lot in social sciences is
13 construct validity. How do you measure
14 construct validity? Well, you can look to see
15 whether experts believe that it measures what
16 it purports to measure.

17 Well, clearly, this constant sum
18 question has been used before. And in some
19 sense it actually also has predictive validity
20 in the fact that in 2004 to 2005, it was the
21 foundation by which the Judges made their
22 rendering about allocations.

23 So with respect to validity, I didn't
24 feel -- we're not looking at a new
25 questionnaire. I did not feel we needed to --

1 that I needed to go out and measure or attempt
2 new empirical data with respect to validity.
3 And even if I was interested in doing so, which
4 I'm always interested, it is almost impossible
5 to assess that at this point.

6 JUDGE STRICKLER: Excuse me. Did I
7 hear you correctly that you said that the Bortz
8 survey has predictive validity because the
9 Judges in '04 and '05 adopted it?

10 THE WITNESS: Yes. So, you know, one
11 thing you look to see is whether an instrument
12 has been used for the purpose for which it was
13 collected. And we see, you know -- and that is
14 a form of either construct or predictive
15 validity.

16 JUDGE STRICKLER: Thank you.

17 BY MR. OLANIRAN:

18 Q. And with respect to reliability, you
19 said that you did not perform any statistical
20 tests; is that correct?

21 A. No, I did not.

22 Q. Thank you.

23 JUDGE FEDER: Excuse me. How are you
24 defining reliability in this context?

25 THE WITNESS: So that's a great

1 question, because we all have different uses of
2 that term. And unfortunately in statistics
3 there are two uses of the term reliability. So
4 let's make sure we are perfectly clear.

5 The one Mr. Cho and I just talked
6 about with respect to reliability has to do
7 with confidence intervals. And so that's
8 talked about as reliability.

9 But I'm going to presume that I
10 understand that what you're talking about with
11 respect to reliability is often referred to
12 such as test/retest reliability. That is, does
13 administration of this instrument to the same
14 person within the same time frame, when nothing
15 else has changed, get you the same answer?
16 That's a measure of test/retest reliability
17 that is often considered in thinking about
18 questionnaires.

19 Because -- the analogy I like to use
20 is one with my sense of blood pressure. If you
21 have a blood pressure device -- right -- you
22 want it, if I put it on my arm or your arm or
23 anyone else's arm, you want it to be a
24 consistent measuring device. And if you put it
25 on my arm now and you do it two minutes

1 later -- and hopefully my blood pressure hasn't
2 gone up -- and if it renders the same blood
3 pressure, you see it as a reliable instrument.

4 You would like the same thing with
5 respect to a survey. And when you say the test
6 of reliability, that was my assumption. But
7 I'm glad you asked the question that clarified
8 that. That's very different than the
9 confidence intervals and reliability that we
10 just had been talking about.

11 BY MR. OLANIRAN:

12 Q. And stated with respect to the latter,
13 stated differently, just means that the study
14 yields consistent results under the same
15 conditions. Is that a fair way to put it?

16 A. Under the exact same conditions in the
17 same time frame administered to the same
18 respondent.

19 Q. So you didn't do any reliability
20 testing, did you?

21 A. I was hired in 2016. These data were
22 collected in 2010 to 2013. There is no way
23 post hoc to do the kind of measure of
24 reliability that we just discussed.

25 Q. Okay. And following your review, you

1 concluded that the 2010 through '13 Bortz
2 survey provide a valid and reliable assessment
3 of the marketplace value of different
4 categories of distant signal programming that
5 cable systems carried during the 2010 through
6 '13 years; is that correct?

7 A. You're obviously quoting from a
8 particular paragraph. You want to point me to
9 that paragraph, just so I see it?

10 Q. Yes, paragraph 2 -- I'm sorry, page 2,
11 paragraph 4 of your Direct Testimony.

12 A. Yes, I do see that.

13 Q. Okay. Is it fair to describe the term
14 "valid" as meaning a survey measures what it
15 purports to measure?

16 A. Well, certainly validity is measured
17 and discussed in statistics a lot of different
18 ways. And construct validity does, while it
19 may appear to be circuitous to us sitting here
20 in Court, it is how construct validity is
21 designed.

22 Q. And the thing being measured in this
23 proceeding is the marketplace value of
24 different categories of distant signals
25 programming?

1 A. Well, the question before the Court
2 is, right, how to distribute the royalties.
3 And one approach that has been taken and has
4 been relied upon in the past is to look at the
5 relative valuations by cable system executives.

6 Q. So was that a yes to my question?

7 A. I think it is a yes.

8 Q. Thank you. And the different program
9 categories to which you refer in your testimony
10 are the program categories that are identified
11 in the Bortz surveys; is that correct?

12 A. That's correct.

13 Q. And the only survey literature you
14 cite in your Direct Testimony is Dr. Diamond's
15 Reference Manual, which I think you've
16 testified to, this Exhibit 3011. And the scope
17 of the reference guide is somewhat limited, I
18 think, as you testified; is that correct?

19 A. What do you mean by "it's limited"?

20 Q. In other words, the manual is not
21 exhaustive of all of the issues that are
22 related to survey research, but it is a guide;
23 is that right?

24 A. It is a reasonable guide to the major
25 issues.

1 Q. Thank you. And you're familiar with
2 the testimony of Dr. Steckel on behalf of the
3 Program Suppliers; is that right?

4 A. I am.

5 Q. And for his Direct Testimony, he
6 relied on the Federal Judicial Center's Manual
7 for Complex Litigation. Do you recall that?

8 A. I do recall him citing to that, yes.

9 Q. And that's a reputable publication
10 too, is it not?

11 A. It is a similar guide to the one that
12 I've used, yes.

13 Q. And in his Direct Testimony,
14 Dr. Steckel referred to several factors,
15 criteria -- I think the MCL criteria -- that he
16 believed that a survey must conform to. Do you
17 recall that?

18 A. I do recall him citing to that guide.
19 I don't remember exactly his testimony on those
20 points.

21 Q. Okay. I'll represent to you these are
22 direct quotes from Dr. Steckel's testimony.
23 I'm just to read those several factors that he
24 identified to you.

25 First is: The population was clearly

1 chosen and defined. The sample chosen was
2 representative of that population. The data
3 gathered were accurately reported. The data
4 were analyzed in accordance with accepted
5 statistical principles. The questions asked
6 were clear and not leading. The survey was not
7 conducted by -- was conducted by qualified
8 persons following proper interview procedures.
9 And the process was conducted so as to ensure
10 objectivity.

11 Do you agree with those factors?

12 A. Those seem like reasonable factors
13 that one should strive for in data collection,
14 yes.

15 Q. Now, are you familiar with the phrases
16 "recall bias" or "respondent bias"?

17 A. Yes.

18 Q. Okay. And it's a systemic error that
19 is caused by a respondent's failure to
20 completely or accurately recall information
21 being sought by the interviewer; is that
22 correct?

23 A. Would you just repeat? I just want to
24 make sure I agree with you before I say I
25 agree.

1 Q. Fair enough. It is a systemic error
2 that is caused by a respondent's failure to
3 completely or accurately recall information
4 being sought by the interviewer.

5 A. Right. So there are two pieces to
6 this. So one is, you know, responding or
7 recall, and the second part is bias. So bias,
8 as opposed to error when we talk about it, bias
9 is always systemic and pushes respondents
10 towards one direction or another, as opposed to
11 respondent error, which can be inaccurate
12 answers in either direction.

13 So I just want to make sure we're
14 clear on those two, because respondent bias
15 would suggest, you know, a particular direction
16 of the error.

17 Q. Could you have both a recall bias and
18 respondent error as part of the response?

19 A. Typically, when we are looking at
20 measurement error, we look at either error or
21 bias. Because bias would suggest that the
22 question or that the respondents all move in a
23 particular direction in answering the question,
24 whereas error is just an inaccuracy where some
25 people may overestimate, some people may

1 underestimate.

2 Q. My question is whether or not you
3 could actually have both present in a survey
4 response.

5 A. Not with respect to a single question.
6 So a single question is either going to be
7 accurate, potentially fraught with error, or be
8 biased, but not biased and error.

9 Q. With respondent error, is it of
10 particular concern in retrospect -- strike
11 that.

12 Is it only of concern with regard to
13 retrospective studies?

14 A. I just want to clarify some terms.
15 You keep talking about respondent error. And I
16 think the term that I use, because I do
17 research in this area, tends to be response
18 error.

19 Q. Response error.

20 A. So it's not that the respondent is
21 erroneous; it's that their response may be
22 erroneous. And you can have response error in
23 both factual and opinion questions.

24 Q. Let me try to get a clarification on
25 that. What error do you associate with failure

1 of a respondent to completely or accurately
2 recall information being sought by the
3 interviewer?

4 A. I would call that response error.

5 Q. Fair enough. Let's go with that. And
6 back to my question whether or not this
7 particular error is associated principally with
8 retrospective study.

9 A. No, it is not just related to
10 retrospective recall.

11 Q. Okay. It's a survey axiom, is it not,
12 that the further back you ask the respondent to
13 recall the information, the less reliable that
14 information provided by the respondent becomes?

15 A. I think you have been reading my own
16 writing. So I think we want to be perfectly
17 clear on this. When you are asking people
18 about episodic information -- so I'm coming to
19 you and asking you about how many times you
20 went to the dentist; right? Asking you about
21 that for last year is going to have some
22 measurement error associated. If I ask you
23 about how many times you went to the dentist
24 five years ago, you have to search your memory
25 and try to come up with that answer.

1 And when we plot response error
2 related to the recall of episodic information,
3 that is information stored in respondent's
4 memories as discrete episodes, we know that the
5 recall of that information is poorer the
6 further back you ask someone to report.

7 Q. Thank you.

8 A. Let me -- we do not have that same
9 body of empirical literature with respect to
10 going back to asking about issues that are, for
11 instance, when a respondent is reporting for an
12 establishment survey, for which we are not
13 asking them for episodic recall. They're
14 not -- in fact, if we look at the constant sum
15 question, we are not asking them about
16 particular occurrences in their life. We are
17 asking them about a particular year and
18 reporting about how they would have allocated
19 it that year.

20 Q. So my question is whether or not, with
21 regard to what you call an establishment
22 survey -- would you regard the Bortz survey as
23 an establishment survey?

24 A. In both the Bortz and the Horowitz,
25 the respondent is reporting on behalf of the

1 establishment, as opposed to their own
2 personal, you know, life or demographics or
3 opinions.

4 Q. That's a yes?

5 A. I'm getting there. Yes.

6 Q. Okay. Thank you.

7 JUDGE STRICKLER: It was a quick trip.

8 THE WITNESS: Sorry.

9 (Laughter.)

10 BY MR. OLANIRAN:

11 Q. And so with regard to establishment
12 surveys, your testimony is that there is no
13 empirical data as to whether or not the further
14 you go back in time the less reliable the
15 respondent's response is?

16 A. I'm saying that I'm not aware of the
17 same empirical data that we have with respect
18 to asking people episodic information in
19 demographic surveys.

20 Q. What is your opinion?

21 A. Well, clearly, you know,
22 contemporaneous measurement is going to be less
23 fraught with error than when you are asking
24 about things in the distant past, whether that
25 is demographic or establishment. How that

1 memory decay function happens for people
2 responding on behalf of establishments or
3 companies or cable systems is not as clear-cut
4 to me as it is for asking people about their
5 own personal memories.

6 Q. Now, each Bortz survey occurs sometime
7 after the end of the particular royalty year
8 that the survey is designed to study; correct?

9 A. That's correct.

10 Q. And each survey seeks to have
11 respondent recall certain information about the
12 programming during that royalty year; correct?

13 A. Correct.

14 Q. So in the context of the Bortz
15 surveys, you would expect that the further back
16 you ask a survey respondent to recall
17 information about programming, the less
18 reliable their responses would become; correct?

19 A. Well, now you've brought in the word
20 "reliable" again. If the same empirical
21 literature that we know about demographic
22 surveys applied to establishment, yes, the
23 further back you go you would expect there
24 would be less accurate information.

25 However, there are all kinds of things

1 that you can do to improve that, like encourage
2 the respondent to think about the particular
3 reference period of interest. And once again,
4 as I have already said, thinking about going
5 further back with respect to recall of
6 information related to establishments is
7 different than thinking about your own episodic
8 memories.

9 Q. And you certainly, in your testimony,
10 relied on either testimonies from past
11 proceedings as well as some of the Judges --
12 some of the past decisionmakers'
13 determinations; correct?

14 A. Yes, I reviewed prior testimony as
15 well as prior rulings in my consideration.

16 Q. Okay. So you must be aware, then,
17 that the Bortz report was criticized in past
18 proceedings for recall bias issues?

19 A. I do remember seeing that, yes.

20 Q. And according to Mr. Trautman's
21 testimony, actually, the Bortz survey covering
22 the 1983 royalty year was conducted in 1985.
23 I'm not quoting, but paraphrasing his
24 testimony. And he also said that Copyright
25 Royalty criticized the Bortz survey because

1 they were concerned about the ability --
2 because the Tribunal was concerned about the
3 ability of the respondents to recall, in 1985,
4 information about programming actually carried
5 in 1983. Do you recall reading that in
6 Mr. Trautman's testimony?

7 A. I don't remember that particular piece
8 of information, no.

9 Q. I think it should be up on the screen.
10 It's page -- Appendix A, page 11 of
11 Mr. Trautman's testimony -- written testimony
12 do you see that?

13 A. Okay. Now that you have reminded me,
14 yes, I have read this in Mr. Trautman's report.

15 Q. Would you have agreed with the
16 Tribunal's criticism in that case?

17 A. You know, I don't have those
18 questionnaires in front of me, so I don't know
19 how they phrased the questions. But I will
20 take it at face value that their criticism was
21 a valid concern.

22 Q. In preparing your Direct Testimony,
23 did you ask the Bortz Company, or Mr. Trautman,
24 when each of the 2010 through 2013 surveys was
25 commenced and completed?

1 A. You can actually see that in the Bortz
2 report. There is a table that shows the
3 beginning and ending dates of each of the years
4 of data collection.

5 Q. So you are aware then that the 2010
6 survey did not commence until December of 2011;
7 correct?

8 A. I am aware of that, in part, because
9 the Bortz & Associates was waiting to find --
10 was awaiting the results of a pilot study, as
11 well as waiting for the results from -- or the
12 ruling from the Judges in the 2004 to 2005
13 distribution case in order to see if they
14 needed to modify the questionnaire further.

15 Q. I understand. I'm not asking why it
16 was late. I am just asking whether or not you
17 are aware of that.

18 A. I thought I would just offer that
19 there were reasons why they delayed the data
20 collection for that particular year.

21 Q. So you are also aware that the
22 majority of the 2010 survey was conducted in
23 2012; right?

24 A. Let me just grab Mr. Trautman's report
25 to verify that.

1 Q. I don't think you will find that in
2 Mr. Trautman's report, by the way. But if you
3 are not aware, that is fine.

4 A. No, I think it is -- I think the dates
5 of the data collection are somewhere in the
6 Bortz report.

7 JUDGE STRICKLER: We are having a
8 recall dispute. Let's see who's right.

9 (Laughter.)

10 THE WITNESS: Because I know I've seen
11 a table with this. So it's somewhere in here.

12 MR. LAANE: I believe it is Table 2-3,
13 if that helps.

14 THE WITNESS: Thank you. Yes, it is.
15 It is the bottom of page 21 of the Bortz
16 report.

17 JUDGE STRICKLER: Well, that doesn't
18 actually tell you when the majority of the
19 studies were done. That just tells you that
20 was the period in which the studies were done;
21 right?

22 THE WITNESS: Right. I thought the
23 question was referring to when did the field
24 period start and end. But, no, you don't know
25 when the actual -- looking at this table, you

1 don't have the dates of the actual data
2 collection for the majority of the studies.

3 BY MR. OLANIRAN:

4 Q. My question was whether or not you
5 were aware that the majority of the 2010 survey
6 was completed in 2012.

7 A. Right. And, no, before you mentioned
8 that, no, I wasn't aware. Other than looking
9 at this and seeing that because the start date
10 is 12-7-2011 and goes until April of 2012. My
11 assumption was that the majority of it had been
12 in 2012. But I haven't looked at the actual
13 data to see if that is true.

14 Q. Okay. And so the timeline from the
15 end of 2010 to the completion of the survey in
16 2012 is about 16 months, roughly; right?

17 A. It is.

18 Q. Okay. And so it's reasonable to
19 conclude that assuming that the majority of the
20 survey -- since you don't know, let's assume
21 that the majority of the 2010 surveys were, in
22 fact, completed in 2012. It's reasonable to
23 say that those interviews that occurred in 2012
24 for the 2010 survey create significant recall
25 bias issues; right?

1 A. Certainly -- and this is not an ideal
2 time to steal the questionnaire for 2010, but
3 you also have to look at the questionnaire
4 where you see changes that have been made to
5 the Bortz questionnaire over the years and
6 where they clearly reference to the respondent
7 the calendar year they're to be thinking about
8 in answering the question.

9 Q. So we shouldn't take the timeline into
10 account when we evaluate whether or not a
11 particular survey creates recall issues?

12 A. I didn't say that. That's not my
13 testimony. I'm saying that there have been
14 changes made to the Bortz questionnaire that,
15 because of the fact that they don't go into the
16 field until there is a time lag, that they
17 remind the respondent in the phrasing of the
18 question the calendar year that is of interest.

19 Q. Do those changes alleviate the recall
20 issue?

21 A. They certainly remind the respondent
22 that the question wording is referring to the
23 past and not present. And I think on this
24 point if we wanted to look specifically at the
25 Bortz versus the Horowitz questionnaire, there

1 is a key difference --

2 Q. I'm not asking about the Horowitz
3 questionnaire, by the way. Let's -- let's stay
4 with the Bortz questionnaire, if you don't
5 mind.

6 MR. LAANE: Your Honor, if the witness
7 could be allowed to complete her answer.

8 JUDGE BARNETT: I think she answered
9 the question about the Bortz survey.

10 Go ahead, Mr. Olaniran.

11 MR. OLANIRAN: Thank you, your Honor.

12 BY MR. OLANIRAN:

13 Q. Notwithstanding the improvements to
14 the Bortz survey, you would agree though that a
15 16-month time lag between 2010 and the 2012
16 when the surveys were completed does create a
17 recall issue, doesn't it?

18 A. Definitely, the respondent has to work
19 harder to get back to that information. And I
20 think it's also important to just note that in
21 the 2011, 2012 and 2013, you don't see as long
22 of a delay in the field period.

23 Q. Are you aware that a portion of the
24 2011 surveys were also completed in 2012 -- I'm
25 sorry, in 2013?

1 A. Yes, there is a portion completed in
2 2013.

3 Q. There's also a longer timeline for
4 completion -- maybe not as long as the 2010 --
5 is there not?

6 A. No, but you can also see that they
7 start in August of 2012.

8 Q. I understand that they started about
9 the time that they normally would start, but
10 they still have an extended timeline with
11 regard to completion?

12 A. Yes, they did.

13 Q. And that also could create recall
14 issues?

15 A. It could.

16 Q. Did it?

17 A. One cannot know for certain, looking
18 at these data.

19 Q. Can you test for it?

20 A. There is no way, looking at the Bortz
21 data post hoc, to test for that, no.

22 Q. So you didn't test for it?

23 A. Given that there is no test, no.

24 Q. Now, have you mentioned this lag time
25 at all for 2010 and some of the 2011 surveys in

1 your testimony?

2 A. I did not, no.

3 Q. In paragraph -- on page 5,
4 paragraph 11 of your testimony -- just making
5 sure, bear with me. You state -- are you
6 there?

7 A. Excuse me; what paragraph was it?

8 Q. Paragraph 11, page 5, the bottom of
9 page 5. And you state in that paragraph that,
10 "The Bortz survey was designed to address the
11 relevant question of interest." Do you see
12 that?

13 A. I do.

14 Q. What is the relevant question?

15 A. Here, I'm not an economist. I look to
16 how the Judges have in the past discussed the
17 relative valuation. And to me, the relevant
18 question of interest is how should the
19 royalties collected from distant signals be
20 distributed to the various Claimants; right?
21 Those various Claimants are represented in the
22 survey via the different program categories.
23 Q. And with regard to that question, do
24 you agree that the Bortz survey purports to
25 discount the relative marketplace value of

1 different categories of programming as they are
2 organized within this proceeding?

3 A. I believe they do, yes.

4 Q. And so you think the Bortz survey has
5 answered that question?

6 A. I do for not just the question that
7 they used, but who they chose as the
8 respondents.

9 So, you know, one of the issues that
10 clearly there are various opinions on is who is
11 the -- what is the population of interest? Who
12 is the buyer here? And, you know, in the Bortz
13 survey we see a survey of cable system
14 executives; right? And in previous rulings,
15 clearly the Judges have also seen that the
16 buyer, that the population of interest are the
17 cable system executives.

18 Q. And you've used the phrase "relative
19 marketplace value." And so my question for you
20 is what do you understand by the term
21 marketplace?

22 A. Well, it is a hypothetical market;
23 right? So what we're trying -- you know, every
24 one of these cable system executives has paid
25 for being able to transmit these distant

1 signals. Their royalty payments have to be
2 disbursed back to the original holders of the
3 Copyrights. And so there is no true
4 marketplace; right? They are purchasing
5 signals, not categories. They have to -- but
6 the royalties belong back to the original
7 Copyright Owners.

8 Q. So in -- the Bortz survey is asking
9 respondents who are cable system executives to
10 allocate a fixed-dollar amount across the
11 programming categories in these proceedings; is
12 that correct?

13 A. Yes, I think that's a fair
14 summarization of that question.

15 Q. And in this hypothetical marketplace,
16 do you know who the buyer is?

17 A. Well, as I've stated before, right,
18 the buyer here is the cable system executive.

19 JUDGE STRICKLER: Just to be clear,
20 the question asks for an allocation of points,
21 not money; right?

22 THE WITNESS: Let's look specifically
23 at the wording.

24 JUDGE STRICKLER: This is Question 4;
25 correct?

1 THE WITNESS: Right. It is: Assume
2 your system spent a fixed-dollar amount by 2010
3 to acquire all the non-network programming.
4 What percentage, if any, of the fixed-dollar
5 amount..." So it focuses in on a percentage of
6 a dollar amount, not points.

7 JUDGE STRICKLER: Thank you.

8 BY MR. OLANIRAN:

9 Q. And who would be the buyer in this
10 market?

11 A. The person who purchases the distant
12 signals to be transmitted.

13 Q. And who is the seller?

14 A. This is technical from -- I'm not --
15 my expertise isn't in the cable market. I
16 actually don't think I completely know who the
17 sellers are. Probably the producers of those
18 distant signals, since they are purchasing
19 these distant signals.

20 Q. And when you say the producers, do you
21 mean the owners of the programming?

22 A. The owners of the signal. But once
23 again, this is not my area of expertise. I
24 have already admitted to that.

25 Q. I understand that. Because you've

1 agreed that the Bortz results represent
2 relative marketplace value of the different
3 categories of programming, and I'm trying to
4 get an understanding what you perceive to be
5 the marketplace that is being referenced in
6 that standard.

7 A. Well, the marketplace purchasers are
8 the people who purchase the distant signals.

9 Q. I understand that.

10 A. Can I, please --

11 Q. Sure.

12 A. As a survey methodologist, that's the
13 key question to me; not who the sellers are.
14 Because if the purchasers are the cable system
15 executives, that's my population of interest
16 that I have to sample.

17 So not to be kind of, you know, trite,
18 I don't really care as a survey methodologist
19 who the sellers are. Because to me, I need to
20 know who that population of interest is for the
21 survey. And that means I have focus in on who
22 is the buyer.

23 Q. So as a survey researcher, you are
24 looking at the behavior of the buyer in the
25 marketplace, not the behavior of the seller?

1 A. I am looking at to be able to answer
2 this from the perspective of the buyer, yes.

3 Q. As far as you understand, the survey
4 results are just from the perspective of the
5 buyer in the marketplace?

6 A. Well, now you've posed a different
7 question. Maybe some of these are also
8 producers. I don't know whether there are also
9 producers in the survey. I'm looking at them
10 from their behavior of being the purchaser.

11 Q. I'm just trying to get some clarity.
12 And I -- I take your point well. I'm just
13 making sure that I understand what you are
14 saying. That when you are looking at the Bortz
15 survey results, and you agree that the Bortz
16 survey results represent the relative
17 marketplace value of different categories of
18 programming -- and I don't want to misstate
19 your testimony, so correct me if I am wrong --
20 what you're saying is that the relative
21 marketplace value of different programming as
22 presented by Bortz represents the perspective
23 of the buyer?

24 A. That's my interpretation.

25 Q. Okay. Thank you. And do you believe

1 that to be the interpretation of the
2 respondents when they're answering these
3 questions?

4 A. I think they're responding as the
5 people who purchase distant signals.

6 Q. I understand that. But my question is
7 whether or not you believe your interpretation
8 to be the same as the respondents' when they
9 are answering these questions posed by the
10 Bortz interviewer?

11 A. I couldn't answer what frame of mind
12 the respondents are in when answering the
13 question.

14 Q. From the survey researcher stand
15 point, is it your opinion that the Bortz
16 interviewers intended for the respondents to
17 have the buyer's perspective in mind when they
18 are answering the question?

19 A. I think they are -- you know, if you
20 look at the questions, they are asking someone
21 who is responsible for programming decisions.
22 And that's the person -- they're answering
23 questions from the perspective of the
24 importance of programming. That's the frame
25 that they are asked to think about. I'd have

1 to look once again to the introduction to the
2 Bortz questions.

3 But, you know, if we look at, "Can I
4 ask to speak to the person most responsible for
5 carriage decisions for the system?" So that's
6 the frame that the respondent in the survey is
7 introduced; right? And they're being asked to
8 talk about regarding certain programming. So,
9 you know, they are not told you are the
10 purchaser of distant signals. They are being
11 told that the survey is about programming
12 carriage decisions.

13 Q. Just asking them about what they would
14 pay or how expensive and things of that nature;
15 right?

16 A. We can look at the specific
17 questionnaire, but they asked them how
18 important various program categories are; what
19 those program categories would cost in a free
20 and open market; and then how they would value
21 those. Yes.

22 Q. Okay.

23 A. So I just want to be clear; right? My
24 idea about the buyer, that is an issue with
25 respect to sampling frame. The respondent is

1 never told that they are the buyer. That isn't
2 what is introduced to the respondent. They're
3 told that this is a survey about carrying
4 certain programs.

5 And so the questions that they are
6 being asked is about the carriage and
7 importance of certain programming across these
8 distant signals.

9 Q. I'm not sure --

10 A. We have been back and forth on
11 language, and I just want to be perfectly
12 clear; right? When you are designing a survey,
13 you have to make a decision about what is your
14 universe? Who are you going to sample? And
15 the decision by Bortz to sample cable system
16 executives comes, as I understand it as a
17 non-economist, since they are the deciders with
18 respect to which distant signals to purchase.

19 But when they're brought into the
20 survey and the questions, right, the
21 questioners don't say to them -- don't say to
22 the respondent: We are calling you because you
23 are the purchaser of distant signals; we are
24 calling you because you are the person in
25 charge and we're going to talk about, you know,

1 cable systems regarding certain programming
2 they carry. And are you the person responsible
3 for programming carriage decisions?

4 So they are already introducing this
5 issue of program categories to them, as opposed
6 to distant signals.

7 Q. But are you saying that the Bortz
8 survey did not intend to associate making
9 programming decisions with acquisition of
10 programming?

11 A. No, I'm not saying that. They clearly
12 review with the respondent the distant signals,
13 up to eight of them, that are of consideration
14 in answering these questions.

15 Q. So in your view when you look at the
16 survey, would you expect that the person,
17 responsible for acquisition of programming, is
18 also -- strike that.

19 From a survey researcher's
20 perspective, when you are looking at the
21 screening questions, this Question Number 1,
22 are you interpreting that -- are you -- do you
23 understand that the person most responsible for
24 programming carriage decisions also has
25 knowledge about purchasing decisions made by

1 the system?

2 A. Yes, I would think they do.

3 Q. Okay. So there is a link between the
4 program carriage decisions and purchasing
5 decisions; right?

6 A. Yes, I just wanted to be clear,
7 because when I said the buyer, I wanted to make
8 sure that we linked back to the actual wording
9 that was used in the questionnaire.

10 MR. OLANIRAN: Your Honor, I'm not
11 sure whether or not you wanted a clean break.

12 JUDGE BARNETT: Changing topics,
13 Mr. Olaniran?

14 MR. OLANIRAN: Yes.

15 JUDGE BARNETT: This is as good a time
16 as any. We will take our noon recess and we
17 will reconvene at 12:55.

18 (A lunch recess was taken at 11:55
19 a.m., after which the trial resumed at 1:04
20 p.m.)

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1 AFTERNOON SESSION

2 (1:04 p.m.)

3 JUDGE BARNETT: Please be seated.

4 Mr. Olaniran, not to cramp your style,
5 but I'm curious if you have a time estimate for
6 this witness.

7 MR. OLANIRAN: I actually mentioned to
8 counsel for JSC, I'm looking at maybe an hour
9 to an hour and a half, depending on how the
10 conversation goes sometimes.

11 JUDGE BARNETT: And who else is going
12 to be examining this witness?

13 MR. COSENTINO: I will be, Your Honor.

14 JUDGE BARNETT: Mr. Cosentino. Okay.
15 And then redirect?

16 MR. LAANE: Yes, Your Honor. It's
17 going to depend on what else we hear. Right
18 now I don't anticipate much.

19 JUDGE BARNETT: Okay, all right. Like
20 I said, this is in your hands. We're on day
21 four and witness two.

22 (Laughter.)

23 JUDGE FEDER: Just 23 to go.

24 THE WITNESS: I'm sorry.

25 JUDGE BARNETT: No, no, that's --

1 we're -- I'm really actually fascinated by your
2 testimony, but that's my thing, you know.

3 Mr. Olaniran?

4 MR. OLANIRAN: Thank you, Your Honor.

5 CROSS-EXAMINATION -- Resumed

6 BY MR. OLANIRAN:

7 Q. Dr. Mathiowetz, I -- I want to take
8 you back to a discussion you had yesterday, I
9 think, with Mr. Laane with regard to the number
10 of categories you can -- you can focus on in a
11 survey.

12 Do you recall that conversation?

13 A. Well, there were several conversations
14 around that.

15 Q. And I think, you know, this was
16 regarding guidelines regarding how many
17 different categories you can have in a constant
18 sum survey or something to that effect.

19 A. Yes, I remember that.

20 Q. Yeah, and I -- and I think your
21 testimony was that there are no fixed
22 guidelines regarding how many different
23 categories. I think that you testified that
24 the literature mentioned ten, after ten or
25 more, you have to start paying attention,

1 something like that? Is that --

2 A. You know, clearly, including the
3 articles that Dr. Steckel referenced, there's
4 discussion that once you get to ten or more
5 categories, you should consider different
6 methods.

7 Q. Okay. And how are you defining
8 categories?

9 A. So here I would consider a program
10 category is -- is a category. So the constant
11 sum questions that respondents were faced in
12 the Bortz survey, they are making an assessment
13 across five, six, or seven categories.

14 Q. Okay. And so you are considering
15 categories with regard only to the constant --
16 constant sum question?

17 A. Well, that was the nature of the
18 conversation --

19 Q. I see.

20 A. -- I was having with Mr. Laane.

21 Q. Okay, thank you. And do you have a
22 binder of the Program Suppliers'
23 cross-examination exhibits by any chance?

24 A. No, I do not.

25 Q. Okay.

1 MR. OLANIRAN: May I approach, Your
2 Honor?

3 JUDGE BARNETT: You may.

4 BY MR. OLANIRAN:

5 Q. Can you take a look at Exhibit 6020.
6 Oh, I think that exhibit is restricted, but...

7 JUDGE BARNETT: And would you like to
8 close the --

9 MR. OLANIRAN: I don't think we have
10 anyone in the room that is not supposed to be
11 here.

12 JUDGE BARNETT: I don't either, but in
13 case there's anyone in the room who is not --
14 has not signed a nondisclosure agreement or is
15 not privy to confidential information --

16 MR. OLANIRAN: I can just identify the
17 document at the top, and most of the following
18 references actually do not identify that system
19 in particular.

20 JUDGE BARNETT: Okay, thank you.

21 BY MR. OLANIRAN:

22 Q. Dr. Mathiowetz, this is the Charter
23 Cable questionnaire for 2010. Do you see that?

24 A. I do see that.

25 Q. Okay. And this is the -- one of the

1 non-WGN-only questionnaire, right?

2 A. Correct.

3 Q. And do you see the date of completion
4 on that, on the document?

5 A. It's hard to read. It looks like it
6 might be 3/6/12.

7 Q. Okay. That's the same that I read.

8 And I want to ask some questions
9 about -- about the questionnaire, but let's
10 review just briefly the different parts of the
11 questionnaire. Okay?

12 JUDGE BARNETT: Before we proceed,
13 Mr. Olaniran, this has already been admitted?

14 MR. OLANIRAN: Yes, it is.

15 JUDGE BARNETT: Thank you.

16 MR. OLANIRAN: Sorry.

17 BY MR. OLANIRAN:

18 Q. And so Question 1 is the screening
19 section, right?

20 A. Correct.

21 Q. Please go to Question 2b. That is the
22 question that identifies all of the signals
23 carried by -- by this cable system, correct?

24 A. Well, it identifies the distant
25 signals that are the focus. So let me just

1 count how many there are. So there are eight
2 listed here. And if we remember in Bortz --
3 put a limit, so it might not necessarily be all
4 of the distant signals, but it's all of them
5 that are the focus for this interview.

6 Q. Okay. And Question 2b is the -- is
7 the ranking question regarding the importance
8 of the program categories carried by the
9 system. Do you see that?

10 A. Right. This is one of the warm-up
11 questions.

12 Q. Right. And Question 3, another
13 warm-up question, relating to how -- another
14 ranking question related to how expensive each
15 program category is, right?

16 A. Yes.

17 Q. And then Question 4a is the payoff
18 question. That's the constant sum question.
19 Right?

20 A. Correct.

21 Q. Okay. Do you recall average length of
22 the -- of each interview?

23 A. I don't remember that being reported
24 exactly.

25 Q. You don't recall at all?

1 A. You know, something in the 10 to 15,
2 20 minutes, something like that, but I don't --
3 I don't remember that particular number.

4 Q. Okay. It's fine. Now, for each of
5 the -- the questions, for Questions 2, 3, and 4
6 -- I'm sorry, Questions 2b, 3, and 4, would you
7 agree that in order to perform the tasks
8 required by the interviewer, the respondent had
9 to do the following -- and tell me if you agree
10 or disagree. First, they had to listen to the
11 list of signals read by the interviewer as
12 carried by the system, correct?

13 A. Well, that they do to 2a. They listen
14 to that in response -- as part of Question 2a.
15 They don't reread the signals in Question 2b.

16 Q. My question was for the tasks that are
17 required to be done in 2b, 3, and 4, would you
18 agree or disagree that the respondents would
19 have to do the following: Recall -- maybe not
20 listen -- recall the list of distant signals
21 read by the interviewer as being carried by the
22 system. Correct?

23 A. They -- they have to have that frame
24 of reference, yes.

25 Q. Just tell me if you agree or disagree.

1 A. Well, they've just been read that list
2 so I don't think of it as a recall. They've
3 been primed with that at 2a and now they're
4 being asked Question 2b. So, to me, that isn't
5 a recall. They have the frame of reference
6 given them in Question 2a.

7 Q. Okay, fine. And the second -- another
8 task, they have to again listen to a list of
9 program categories identified by the
10 interviewer, correct?

11 A. Yes.

12 Q. Okay. And for the alternate ranking
13 exercise, what they have to do is recall all of
14 the content on the signals that were just read
15 to -- the respondent has to recall the content
16 on the signals that were just read to him or
17 her, correct?

18 A. Well, to answer Questions 2b, 3, and
19 4, their frame of reference should be all of
20 the content on these distant signals, yes.

21 Q. Right. And then they have to recall
22 the content of each of the distant signals,
23 correct?

24 A. Well, they are being -- they don't
25 have to parse it out. They're answering them

1 with respect to the totality of those distant
2 signals.

3 Q. You don't think they have to know the
4 -- the content of each signal?

5 A. No, they do, but they're not being
6 asked to -- to do an evaluation for each of the
7 signals. They're being asked to do an
8 evaluation across those eight signals.

9 Q. Well, I understand your statement. My
10 question is whether or not they have to recall
11 the content -- they have to identify the
12 content through recall of which is signal
13 carried, correct?

14 A. They have to be familiar, yes --

15 Q. Okay.

16 A. -- with the content of each of these
17 signals.

18 Q. Okay. And then in that process also,
19 they have to carve out from that content what
20 content is considered network programming on
21 ABC, CBS, and NBC, correct?

22 A. Correct.

23 Q. And then -- but they also have to
24 remember to keep Fox broadcast station content
25 in and not out of that -- out of that content

1 that they're supposed to be considering; is
2 that correct?

3 A. If that's part of the mix of their
4 signals, yes.

5 Q. Okay. And then they then have to
6 reorganize and aggregate that remaining content
7 that they are being asked to evaluate by the
8 program categories that the interviewer read to
9 them, right?

10 A. Yes.

11 Q. And in this case of Exhibit -- well,
12 in the case of Question 2b, this is the
13 first -- the first time that the respondent
14 will be hearing a list of programs would be in
15 Question 2b, correct?

16 A. Correct.

17 Q. Okay. And then once they reaggregate
18 and reorganize the program in the -- within the
19 program categories that the interviewer has
20 asked them to do, they then perform in
21 Questions 2b and 4 and 3 the ranking exercise,
22 right?

23 A. Right.

24 Q. And then for Question 4, they do the
25 evaluation, the valuation exercise; is that

1 right?

2 A. The constant sum question, yes.

3 Q. And then -- okay. And so I ask that
4 question because when you talk about focusing
5 on categories, so I -- based on what I just
6 read you, I counted -- we have eight signals,
7 right?

8 A. Correct.

9 Q. I counted, I think, eight steps that
10 the respondent has to go through based on what
11 we just went through. And then for the ranking
12 exercise and -- and the -- the ranking
13 exercises and the valuation exercise, there are
14 seven steps, right?

15 A. Well, there are six -- even though
16 there are six categories here.

17 Q. I'm sorry, six categories. Yes, six
18 categories.

19 So you have eight -- eight steps,
20 eight signals, six categories.

21 Now, in that discussion about what to
22 focus on, do the eight steps and the fact that
23 you have to take eight signals and map the
24 content on those signals into six program
25 categories, do you consider that at all as part

1 of the categories you have to -- part of the
2 categories you have to focus on?

3 A. No. I mean, we're talking about
4 apples and steaks. I mean, the question -- you
5 know, when you look at parsing out these six
6 categories, so with respect to the constant
7 sum, there's categories here, right? That's
8 very different than thinking about what are all
9 the cognitive processes. Right?

10 Now, you've parsed this out into this
11 very detailed, right, but that isn't -- that
12 wasn't the focus of Mr. Laane's question, nor
13 is that the consideration when you think about
14 the number of categories for a constant sum
15 question.

16 Q. Well, let's just say the number of
17 things that you have to do in order to get to
18 answer Questions 2b, 3, or 4a. Does -- from a
19 survey researcher's standpoint, does that add
20 to the complexity of the task?

21 A. Clearly, this is not a straightforward
22 task that says, you know, how would you rate
23 your health, excellent, very good, good, fair,
24 poor? We are asking the respondent to, you
25 know, consider these stations, think about

1 these six program categories, and now rank --
2 and now rank them.

3 So this is not, you know, just the
4 most simplest of tasks, but it is not beyond
5 the capability of these executives. And on
6 what basis can I say that, right? We don't see
7 notes here about confusion on the part of the
8 respondent. We don't see missing data. We
9 don't see, you know, any indications in the
10 actual data that they don't understand how to
11 do it.

12 So, yes, we can take and break down --
13 for any question that any survey researcher
14 asks, we can break it down in every single
15 cognitive step and it sounds like a lot, but I
16 have to tell you survey researchers ask complex
17 questions all the time.

18 How many times have you been to a
19 doctor in the past 12 months? Right? That --
20 when you ask a respondent that, they have got
21 to think, past 12 months, what are we counting
22 as a doctor, does it count the phone call? I
23 mean -- and respondents do that very quickly
24 and compute -- compute a response.

25 So, yes, the -- it's actually a wonder

1 with respect to how we're able to process these
2 cognitively, but respondents do do these. And
3 when there is confusion --

4 Q. I think you have answered my question,
5 Dr. Mathiowetz.

6 JUDGE FEDER: Excuse me. Do you know
7 whether the researchers were instructed to make
8 notations when they encountered confusion, if
9 they encountered confusion?

10 THE WITNESS: I -- I do know that, as
11 Mr. Trautman reported, that any confusion was
12 supposed to be signalled to the director of the
13 firm that did the interviewing, and no such
14 confusion was noted.

15 JUDGE FEDER: Okay.

16 BY MR. OLANIRAN:

17 Q. Going back to the question, just in
18 general, Question 4, the respondents have to
19 complete -- have to make the percentages such
20 that everything comes up to 100 percent.
21 Otherwise, it's not a constant sum survey,
22 correct?

23 A. That's correct.

24 Q. So to the extent that they don't --
25 they have no opinion or they don't know, there

1 really is no opportunity to -- to give an
2 allocation less than 100 percent, correct?

3 A. Well, respondents can always report
4 "don't know," and well-trained interviewers
5 know to record that. If a respondent -- I
6 mean, you do not force respondents to answer if
7 they say, you know, I have really no way to --
8 to give you that answer.

9 Q. Doesn't Diamond actually prescribe
10 ways to provide the options for respondents to
11 be able to answer "I don't know" or "I have no
12 opinion"?

13 A. All surveys allow respondents to take
14 -- to report "don't know" or "I have no
15 opinion."

16 Q. That wasn't my question. Actually,
17 doesn't Diamond, your reference guide that you
18 relied on, prescribe --

19 A. I believe she does.

20 Q. Okay. And with respect to Questions
21 2b and 3, which are ranking questions and don't
22 have to add up to any number, does Bortz
23 provide an opportunity for the respondent to
24 say "I don't know" or "I have no" -- or say "I
25 have no opinion"?

1 A. Once again, you don't see that on the
2 questionnaire. You usually don't see that on a
3 questionnaire --

4 Q. Usually don't see that on a
5 questionnaire?

6 A. No, you usually do not see an explicit
7 category for don't know, but interviewers are
8 trained to record that when a respondent
9 reports that.

10 Q. Just give me a minute. Let's go to
11 page 389 of 3011. Are you there?

12 A. I'm there.

13 Q. Okay. And that -- the subtitle of
14 that section is were some respondents likely to
15 have no opinion, and, if so, what steps were
16 taken to reduce guessing. Do you see that?

17 A. I do.

18 Q. And the second paragraph under that
19 heading is -- starts with one of the options
20 that the survey researchers could provide the
21 respondents. Do you see that?

22 A. So --

23 Q. The paragraph that starts with
24 "first."

25 A. I do.

1 Q. Okay. And the first option is the
2 survey can ask all respondents to answer the
3 question. Do you see that?

4 A. I do.

5 Q. And if you flip over to page 390 of
6 that exhibit, the second option talks about the
7 fact that the survey can use a quasi filter
8 section to reduce guessing by providing "don't
9 know" or "no opinion" options as part of the
10 question. Right?

11 A. So that's the provision of an explicit
12 "don't know."

13 Q. Right. Which you just testified that
14 you don't typically see that on surveys?

15 A. No, that -- these are -- you're mixing
16 up my testimony. What Diamond is talking about
17 here is the provision on the questionnaire of
18 an explicit "don't know" and read to the
19 respondent. That is, are you in favor or
20 against gun control laws or do you not have an
21 opinion? That's an explicit, you know, no
22 opinion/don't know.

23 That is different from what I just
24 testified to, which is interviewers are trained
25 that if a respondent volunteers "don't know,"

1 they record that. They do not -- no
2 interviewer and no data collector wants to have
3 data that represent guesses by the respondent.

4 So interviewers are trained to record
5 "don't know." What Diamond is talking about
6 here is the provision read to the respondent of
7 an explicit "don't know."

8 Q. Well, the -- if you go back to page
9 389, the very first sentence in that paragraph
10 B reads as follows: "Some survey respondents
11 may have no opinion on an issue under
12 investigation, either because they have never
13 thought about it before or because the question
14 mistakenly assumes a familiarity with the
15 issue."

16 In Questions 2b and 3, what option
17 does Bortz provide in writing for respondents
18 that don't have an opinion or just don't know?

19 A. Right. So, once again, there is no
20 explicit "don't know" provision in this
21 questionnaire but --

22 Q. Is there --

23 A. Can I please finish?

24 Q. You've answered my question.

25 A. Well, but I think it's important for

1 the record to -- to note that the Bortz
2 interviewers were trained to flag their
3 supervisor when there was any indication by the
4 respondents of confusion.

5 Q. Is this in Mr. Trautman's testimony?

6 A. Yes, it is.

7 Q. Let's go to question --

8 JUDGE STRICKLER: Before you go on,
9 would it have been incorrect, improper survey
10 construction to have included explicit "I don't
11 knows" in the survey?

12 THE WITNESS: Well, can we get 50
13 survey researchers in here and we'll have a
14 debate about that?

15 JUDGE STRICKLER: I think I'm actually
16 talking to one, so you're the one I'd like to
17 answer the question.

18 THE WITNESS: Well, we know that when
19 you explicitly provide "don't know,"
20 respondents will gravitate to it, even if they
21 actually do have an opinion, because they see
22 that as an easy way to get out.

23 So in -- questionnaire designers are
24 very cautious with respect to "don't know" or
25 "no opinion" being explicitly read to the

1 respondent, but are always trained interviewers
2 -- interviewers are always trained to take that
3 information down or to note it rather than
4 forcing a respondent to answer a question that
5 they say "I have no idea."

6 JUDGE STRICKLER: Would it have been
7 improper to have put an express "I don't know"
8 as a choice in either Question 2, 3, or 4? In
9 your opinion? Or you can say "I don't know."

10 (Laughter.)

11 THE WITNESS: Well, I don't think I
12 have that option.

13 If you start to go down this path and
14 this respondent starts to -- says "don't know,"
15 then I think you haven't screened properly for
16 the right respondent. I mean, that really then
17 would suggest you need to find the person who
18 can answer these questions.

19 So if you -- if someone encountered --
20 if an interviewer encountered someone who said,
21 well, I have no idea about that, I couldn't
22 answer your questions, then I think that
23 behooves the interviewer to say: I need to
24 speak to someone who can answer these
25 questions.

1 JUDGE STRICKLER: Given all that,
2 would it have been improper to add an "I don't
3 know" to either Question 2, 3, and/or 4?

4 THE WITNESS: I would probably
5 recommend to Bortz to not include the explicit
6 "don't know" just because I know that survey --
7 survey respondents like to sometimes take the
8 easy route.

9 JUDGE STRICKLER: You say you wouldn't
10 recommend it. Would it be wrong to do so?

11 THE WITNESS: There isn't really
12 anything that's wrong or right in my industry.
13 It's based on what your goal is analytically.
14 And analytically here, we need people to assess
15 these program categories, these five, six, or
16 seven. So if they say "don't know" to one of
17 them, analytically it's not going to be of much
18 use.

19 JUDGE STRICKLER: So if I understand
20 you correctly then, it wouldn't be wrong to add
21 an "I don't know"; it's a judgment call
22 depending on the person constructing the
23 survey?

24 THE WITNESS: That's correct.

25 JUDGE STRICKLER: Thank you.

1 BY MR. OLANIRAN:

2 Q. Dr. Mathiowetz, let's turn to, if you
3 still have Exhibit 3011 in front of you, page
4 388, the very first paragraph. Are you there?

5 A. I am.

6 Q. Okay. And in that first paragraph --
7 and I'll read the very first sentence: "When
8 unclear questions are included in a survey,
9 they may threaten the validity of the survey by
10 systematically distorting responses if
11 respondents are misled in a particular
12 direction, or by inflating a random error if
13 respondents guess because they do not
14 understand the question. If the crucial
15 question is sufficiently ambiguous or unclear,
16 it may be the basis for rejecting the survey."

17 Do you see that?

18 A. I do.

19 Q. And in this quote, Dr. Diamond is
20 warning about the potential perils of ambiguous
21 or unclear questions, correct?

22 A. She is.

23 Q. And keeping that in mind, let's look
24 at Question 2b in Exhibit 6020. Are you there?

25 A. Yes, I am.

1 Q. And this question states, in the
2 beginning, that now I'd like to ask you how
3 important it was for your system to offer
4 certain categories of programming that are
5 carried by these stations, referring to the
6 stations -- distant signals carried by that
7 system, right?

8 A. Yes.

9 Q. And then later on in the paragraph,
10 the question asks the respondent to rank the
11 identified program categories in order of their
12 importance to the respondents, right?

13 A. It asks them to rank them with respect
14 to their importance to the system in 2010.

15 Q. I stand corrected. Yeah. And to be
16 clear, the system carried the programming in
17 the form of signals, not in the form of the
18 program categories that the respondent is now
19 being asked to map the content of those signals
20 into, right?

21 A. I'm sorry, could you repeat your
22 question?

23 Q. I'm saying the system carried the
24 programming in the form of signals, right?

25 A. Yes, they purchased signals, yes.

1 Q. Right. They purchased signals. And
2 they are now asking the respondent to map the
3 compensable content into the program categories
4 used by the survey, correct?

5 A. Correct.

6 Q. Okay. And, again, in order to perform
7 that ranking task, we went through the eight
8 steps a few minutes ago that they have to do,
9 right?

10 A. Yes, we did.

11 Q. Okay. And in the -- in Question 2b,
12 the respondent has been asked to do this task,
13 to do this ranking task, even though it just
14 heard the list of the program categories for
15 the first time in that -- in that question,
16 right?

17 A. Well, that's the goal of a warm-up
18 question, right? The whole reason that you put
19 a warm-up question like Question 2b and
20 Question 3, is to start to allow the respondent
21 to get familiar with these program categories
22 before you get to the key question of interest.

23 Q. Okay. And the question presumes that
24 the respondent's system offered the different
25 categories of programming that have been

1 identified with Question 2b, correct?

2 A. Yes. They were tailored to present --
3 so the Bortz questionnaire presents the
4 categories that are related to the distant
5 signals and only those program categories. So
6 you see, as you look across the surveys, some
7 people were faced with five categories; some
8 six; sometimes seven.

9 Q. So in asking that question do you know
10 what marketplace -- since the question presumes
11 that the respondent's system carries those
12 programs, the programs are somehow embedded in
13 the signals they are carrying, right?

14 So my question is what marketplace was
15 intended for the respondent to contemplate in
16 doing their ranking exercise? Is it a
17 marketplace with -- is it a hypothetical
18 marketplace with regulation or without
19 regulation?

20 A. Well, the question asks them to
21 consider these categories in order of
22 importance to your system in 2010, with 1 being
23 the most important and 6 being the least
24 important, that purchasing of those distant
25 signals is within a regulated industry, right?

1 Q. Well, what I mean by "regulation,"
2 just to be clear, is whether or not section --
3 is it a marketplace where Section 111 is still
4 in effect or is it a hypothetical marketplace
5 where no such regulation exists?

6 A. Well, it's asking them about their
7 importance to their system in 2010, since that
8 regulatory market is in place with respect to
9 Section 111 royalties in 2010. That's the
10 reference that they are using.

11 Q. Okay. Well, let's look at Question 3.
12 In Question 3, the interviewer is looking to
13 know how expensive it would have been for the
14 respondent's system to acquire non-network
15 programming on broadcast stations identified by
16 the interviewer. So the same eight signals
17 and --

18 A. Same -- yes, same eight signals, six
19 categories here.

20 Q. Right. And particularly interested in
21 how expensive -- the ranking and order of how
22 expensive it would have been if the
23 respondent's system had to purchase the
24 programming in the marketplace. Right?

25 A. Yes.

1 Q. Okay. And, again, in order to -- to
2 respond to -- to perform this task, remember
3 the eight steps we talked about earlier in
4 Question 3, the respondent still has to do the
5 same thing, right?

6 A. They still have to have the same frame
7 of reference about these eight signals and rank
8 them with respect to cost.

9 Q. And then with the marketplace also,
10 they would be thinking about the 2010
11 marketplace where the Section 111 was in
12 effect, because they had -- as you responded
13 with respect to 2b, in 3, one would expect that
14 they would be thinking about the same 2010
15 marketplace, right?

16 A. Except the question does start out by
17 saying "directly in the marketplace." So
18 these -- you know, these program categories
19 aren't purchased directly in the marketplace
20 when you're talking about these distant
21 signals.

22 Q. That's correct. I'm not sure I
23 understand what's your point.

24 A. So there's a phrase in the beginning
25 of Question 3, right, that they want to acquire

1 non- -- it basically sets the frame of
2 reference for the respondent to acquire these
3 non-network programming if they could purchase
4 them directly in the marketplace, meaning you
5 go out and purchase the program category, not
6 the distant signal.

7 Q. So the frame of reference in 2b is
8 different from the frame in 3?

9 A. Yes.

10 Q. Okay. And you -- with regard to 2b,
11 they are looking at a marketplace where Section
12 111 -- the compulsory license can exist,
13 correct?

14 A. Correct.

15 Q. And then in Question 3, they are not
16 looking at that; they are looking at -- excuse
17 me, one second.

18 In Question 3, they are looking at a
19 situation where the cable system itself
20 actually goes into the marketplace to acquire
21 programming?

22 A. It is what the phrasing of the
23 question says.

24 Q. At least that's your understanding of
25 it?

1 A. Yes.

2 Q. And were those individual programs

3 or --

4 A. Well, I can only interpret what it
5 says there, if you could purchase the
6 programming directly in the marketplace.

7 Q. Okay.

8 JUDGE STRICKLER: Excuse me. When you
9 see the word "programming" there in Question 3,
10 do you understand that to mean a category of
11 programming or an individual program within --
12 within a particular category?

13 THE WITNESS: To me, the way it's
14 being phrased, that programming, it's a -- I
15 think the respondent -- given that they've
16 already been exposed to these questions or
17 these categories of programming, I would think
18 that the respondent's framing them is about
19 those program categories.

20 JUDGE STRICKLER: So it would have
21 been more accurate to say if your system had to
22 purchase that programming category directly in
23 the marketplace?

24 THE WITNESS: That -- that could be a
25 refinement of that question, yes.

1 JUDGE STRICKLER: Do you think it's
2 ambiguous without the word "category" before
3 the word "directly."

4 THE WITNESS: Given that the
5 respondent is once again listed these six
6 program categories, I don't think it's
7 ambiguous.

8 JUDGE STRICKLER: You think the word
9 "programming" and the phrase "programming
10 category" in the minds of a respondent would be
11 equivalent?

12 THE WITNESS: Well, they may be
13 considering individual programs within those
14 program categories, but they're not -- you
15 know, the response test that they're being
16 faced with is to answer about these six program
17 categories.

18 So they very well may have been
19 thinking about one particular type of, for
20 instance, movie in answering that or a
21 particular type of program with respect to live
22 professional and college sports, but they know
23 they have to answer within these six program
24 categories.

25 JUDGE STRICKLER: Thank you.

1 BY MR. OLANIRAN:

2 Q. The question is not clear, is it?

3 A. Well, I think it is clear.

4 Q. You think? Could -- could the
5 respondents have been thinking about buying --
6 purchasing bundles of programming, the program
7 categories? Could they have been thinking
8 about that?

9 A. Well, whether they're thinking about
10 program categories or programs within those
11 program categories, I don't understand why they
12 are -- what the difference is there.

13 Q. Well, because they are --

14 A. I mean, they're still going to end up,
15 right, in a response category ranking the whole
16 categories. And so, for instance, let's just
17 look at this particular respondent, who says
18 live professional and college team sports is
19 the most expensive, right?

20 Well, we don't know if, when they
21 decided that that ranked the highest, whether
22 that was because the entire category is
23 expensive or that they know to purchase a
24 particular program within that category drives
25 those costs way up.

1 Q. If you were -- if the system was
2 purchasing individual programs and that's
3 what's in the mind of the respondent, is that
4 purchase in your mind different from, say, if
5 the respondent is thinking about purchasing
6 bundles of programming? Do you see a
7 distinction in those two types of purchases?

8 A. Not with respect to thinking about
9 ranking the expense of those. So, you know,
10 they have to consider the entire category.
11 What was the determining factor that drove live
12 professional and college team sports to the
13 first? Was it the entire category or was it
14 because they knew that in order to purchase,
15 let's just take NHL hockey, that they would
16 have to -- that that was quite expensive and
17 that's what drove up that whole category.

18 Q. Now, in just -- in a standard survey
19 -- in survey practice, it's necessary to
20 describe the same construct using consistent
21 language, isn't it?

22 A. That's a vague and ambiguous question,
23 so could you be more specific?

24 Q. Let me simplify it. If you are trying
25 to describe a thing in the survey practice, but

1 you have to use consistent language for that
2 thing every time you make a reference to it?

3 A. Ideally, you do want to use the same
4 language. Sometimes you feel you need to
5 embellish that during parts of the survey.

6 Q. Okay. So let me ask you about the
7 language in Question 3. Question 3 begins by
8 telling the respondent that the question would
9 be about how expensive purchasing programming
10 directly in the marketplace would have been.

11 Do you see that?

12 A. Yes.

13 Q. And then in the second sentence, the
14 question then refers to relative cost of the
15 seven program categories. Do you see that?

16 A. Yes.

17 Q. And then in the next sentence, it
18 reverts back to ranking the program categories
19 in order of how expensive. Do you see that?

20 A. Yes.

21 Q. Then the sentence follows -- the next
22 sentence says that -- excuse me.

23 The next sentence says -- now refers
24 to a cost ranking. Do you see that?

25 A. I do.

1 Q. Now, if you were designing this
2 question, you wouldn't use three different
3 phrases for the same -- for the same thing,
4 would you? Well, strike that.

5 The task that's being required in this
6 question is to rank -- excuse me -- is to rank
7 programming in order of how expensive, correct?

8 A. Expensive -- see, to me, those are
9 similar terms, "expense" and "cost."

10 Q. I understand. But do you think it
11 could be ambiguous as an accounting concept,
12 for example, expense versus cost?

13 A. I don't think it adds ambiguity in
14 this question. And, once again, you know, we
15 don't see indications of the respondent's --
16 indicated confusion.

17 Q. Now, if you were drafting -- if you
18 were designing this question, would you have
19 used those three different phrases, instead of
20 just consistently referring to how expensive?

21 A. This is two different phrases, right,
22 expensive and cost?

23 Q. Well, it's how expensive, relative
24 cost, and cost ranking.

25 A. I think in an ideal world, it would

1 have been useful to have the same language
2 throughout that question.

3 Q. Thank you.

4 JUDGE STRICKLER: Do you understand
5 cost to mean dollar cost, opportunity cost?
6 Both? Neither? Or something else?

7 THE WITNESS: Well, given that they
8 introduced this as expensive and then used the
9 word "cost," I think the frame here is dollar
10 costs.

11 JUDGE STRICKLER: So you -- so you
12 understand that cost, without the phrase
13 "expense" or "expensive," could mean other
14 things, other than just dollar cost, but you
15 think expensive refers -- somehow grounds you
16 in dollar cost?

17 THE WITNESS: I -- I do. And once
18 again, I don't worry as much -- these are
19 warm-up questions. These are really meant to
20 try to drive home the issue of these five, six,
21 or seven categories that are going to be
22 central to Question 4.

23 So I'm not as concerned about the
24 language in Questions 2 and 3, as I would be in
25 Question 4.

1 JUDGE STRICKLER: I'm glad you said
2 that because this phrase "warm-up" has been
3 troubling me. I'm not exactly sure what it
4 means. I mean, you could have shown clips from
5 the different categories. That would have
6 warned them up quite nicely as well.

7 If Questions 2 and 3 don't provide
8 information relating to Question 4, are you
9 saying that the only benefits of Question 2 and
10 3 are that they acclimate the survey respondent
11 to the categories such that when you finally
12 give them Question 4, they're already thinking
13 about the categories, regardless of how they
14 answered Questions 2 and 3?

15 THE WITNESS: From my perspective, I
16 include warm-up questions. And you hate to
17 burden a respondent with a warm-up question
18 with a question you're really not going to use
19 analytically, but, you know, we want them to
20 really understand these categories.

21 And so let's clear out the ambiguities
22 about these program categories and understand
23 the nature of a ranking task before we get to
24 this key valuation question. So from my
25 perspective, I have no problem asking one or

1 two questions to a respondent so that they
2 understand what we're talking about with
3 respect to these program categories and what it
4 means to make these tradeoffs across these
5 before we get to the key valuation question.

6 JUDGE STRICKLER: Which tradeoffs are
7 you referring to?

8 THE WITNESS: Well, meaning, you know,
9 in a constant sum, you have to allocate points
10 across these program categories. To me, that's
11 a tradeoff.

12 JUDGE STRICKLER: So Questions 2 and
13 3, the warm-up questions, are also making
14 tradeoffs?

15 THE WITNESS: Yes, because once I rank
16 one of these program categories 1, I have -- I
17 have to -- I can no longer assign a 1 to any
18 other of the program categories.

19 The task isn't quite the same on the
20 constant sum, because, of course, you can have
21 equal allocations.

22 JUDGE STRICKLER: Thank you.

23 BY MR. OLANIRAN:

24 Q. Let's go to Question 4a. Before I ask
25 you specific questions about Question 4a, on

1 page 13, paragraph 34 of your testimony, your
2 direct testimony, you -- do you have it?

3 A. What page number again?

4 Q. 30 -- page 13, I'm sorry, paragraph 34
5 of your direct testimony.

6 A. I have it. Thank you.

7 Q. Okay. And in that, in paragraph 34,
8 you state that the constant sum methodology is
9 a well-established market tool. And you also
10 quote Samuel Book. And, in fact, you then go
11 on to identify three additional sources of
12 support for that statement, Leonard Reid, Joel
13 Axelrod and Robert Crandall.

14 Now, based on the discovery
15 information you provided to us, Samuel Book's
16 testimony was submitted in August of 1991,
17 which is 27 years ago; is that correct?

18 A. Yes, this cites the 1989 proceedings,
19 yes.

20 Q. And Leonard Reid also was submitted in
21 1991, which also is 27 years ago, right?

22 A. Yes.

23 Q. And Axelrod's testimony would have
24 been about 20-plus years ago. It was 22 years
25 ago. It was submitted in 1996, right?

1 A. That's correct.

2 Q. And Robert Crandall's testimony would
3 have been submitted about 2009, which is about
4 nine years ago, right?

5 A. Well, or seven years ago at the time I
6 was writing this.

7 Q. Fair point.

8 And these old testimonies were not
9 addressing the Bortz questionnaire of the --
10 that are being presented in this proceeding,
11 are they?

12 A. No. They're addressing the issue of a
13 constant sum methodology.

14 Q. Okay. But the -- the issue of
15 constant sum methodology was in the context of
16 whatever Bortz report was submitted in those
17 proceedings, correct?

18 A. That's correct.

19 Q. Okay. Did any of these witnesses --
20 were they in any way involved, to your
21 knowledge, in the development of the current
22 Bortz survey?

23 A. I wouldn't know.

24 Q. Okay. Now, digging into Question 4 a
25 little bit, so the respondent is tasked with

1 making a certain -- going back to Exhibit 6020,
2 and then sort of digging into Question 4. The
3 respondent was tasked with making certain --
4 making a certain relative valuation of these
5 different program categories, right?

6 A. Correct.

7 Q. And according to Bortz, the allocation
8 represents relative marketplace value of the
9 program categories at issue in this proceeding,
10 right?

11 A. Correct.

12 Q. And for this task, the respondent,
13 again, had to go through those eight steps we
14 talked about, which I won't repeat, earlier in
15 our discussion, right?

16 A. Yes, they do have to go through a
17 series of steps that they can integrate to --
18 to produce this response.

19 Q. And so Question 4 opens with the
20 statement that -- that the interviewer would
21 like the respondent to estimate the relative
22 value to the respondent's system of programming
23 broadcast by the signal identified as carried
24 by the respondent in 2010. Do you see that?

25 A. Yes. That isn't the exact words that

1 are used, but -- but that's the -- that's a
2 summary of what's being presented.

3 Q. Okay. Now, again going back to the
4 question of marketplace, in Question 2b, you
5 said the marketplace they would have been
6 thinking about in 2010 was the marketplace in
7 which the compulsory license scheme of Section
8 111 was in effect, correct?

9 A. Correct.

10 Q. In Question 3, I believe you said they
11 would have been thinking about a marketplace in
12 which they purchased directly from the market,
13 correct?

14 A. Correct.

15 Q. Now, in Question 4, what marketplace
16 was the interviewer -- was intended for the
17 respondent to be contemplating in making this
18 valuation -- not valuation -- this allocation
19 task?

20 A. So, clearly, here they are not being
21 referenced to, as they are in Question 3, to
22 directly in the marketplace. So they would be
23 back in the marketplace of the Section 111
24 royalties.

25 Q. Okay. And I want to tax your survey

1 expertise, again, if you will. Did you
2 understand from the review of the questionnaire
3 that the program categories used in 2, 3, and 4
4 were intended to be the same?

5 A. Yes. And I do realize that in
6 Question 4, they did expand on the verbiage
7 around the description of those categories.

8 Q. Now, in -- if you look at the
9 description of syndicated shows, there's a
10 special, for example, when you look at how they
11 are identified, how that category was
12 identified in Questions 2b and 3, merely
13 referred to syndicated shows, series, and
14 specials. Do you see that?

15 A. Yes.

16 Q. And then when you go to Question 4,
17 the label was -- the title -- the category was
18 expanded on a little bit by adding produced by
19 or for any of the commercial stations.

20 Do you see that?

21 A. Are we looking at the syndicated shows
22 category?

23 Q. I'm sorry. Distributed to more than
24 one station.

25 A. Right.

1 Q. Okay?

2 A. Yes.

3 Q. And then if you look at the news
4 programming, which is the one I was looking at
5 earlier, in Question 4 it's news and public
6 affairs programs produced by or for any of the
7 commercial stations. Right?

8 A. Yes.

9 Q. And then if you go back to Questions
10 2b and 3, that category, assuming it was
11 intended to be the same, is described as "news
12 and other station-produced programs," right?

13 A. Correct.

14 Q. And, again, to the extent that these
15 categories were intended to be the same
16 categories, would you -- from your survey
17 experience, the language is inconsistent
18 between -- as between Question 2 and 3 and
19 Question 4, isn't it?

20 A. Well, the categories haven't changed,
21 so there's a consistency with respect to, in
22 this case, the six categories, but obviously
23 they've expanded upon the language here in the
24 description of these six categories.

25 Q. You don't think the respondent would

1 be confused where in Questions 2 and 3 they
2 just had one category, the one label, and then
3 in Question 4, they had a different category
4 and --

5 A. Well, I think it's important -- let's
6 look at the full content of this question,
7 right? The interviewer says: "I'll read each
8 of the six programming categories we've been
9 discussing again to give you a chance to think
10 about them."

11 Okay? So right there, the interviewer
12 is signaling to the respondent that I'm going
13 to reread this litany of these six program
14 categories. I'm not changing the categories,
15 right? So they've expanded the language,
16 absolutely they have, but clearly the
17 interviewer is referencing: But these are the
18 same six programming categories that we've
19 already been discussing.

20 Q. If the interviewer is doing that, why
21 not just leave the program descriptions the
22 same way they were -- they are in Question 2b
23 and Question 3?

24 A. That would have been a question you'd
25 have to have asked Mr. Trautman.

1 Q. If you were doing it, how would you
2 have done it differently?

3 A. I would have probably used consistent
4 language descriptions throughout.

5 Q. Now, you talked a little bit about --
6 with Mr. Laane about the WGN-only
7 questionnaire. Do you recall that --

8 A. I do.

9 Q. -- conversation? And you actually
10 agree with Bortz's creation of a separate
11 questionnaire for WGNA-only systems; is that
12 correct?

13 A. Well, I think it was a step towards
14 addressing issues that have been raised by --
15 in rulings in the past concerning the
16 compensable. So they made a decision to do
17 this for WGNA-only. Clearly, it's applicable
18 to all WGNA stations, but for ease of
19 questionnaire administration, they chose to do
20 these summaries just for WGNA-only.

21 Q. And the WGN-only questionnaires,
22 unlike other questionnaires, actually provided
23 advance program summary to the respondents
24 before the actual interview took place; is that
25 right?

1 A. That's correct.

2 Q. And this is an opportunity that was
3 not afforded the non-WGN-only respondents,
4 right?

5 A. That's correct.

6 Q. And the purpose of this special
7 process for WGN-only system was to allow
8 WGN-only system respondents to consider
9 relative value only of compensable programming
10 on WGNA, right?

11 A. Correct.

12 Q. And is it fair to say that in Bortz's
13 view, without -- in view -- strike that.

14 Like in view of the designers of the
15 survey that without this special treatment for
16 the respondents on WGN-only systems, that those
17 respondents could not distinguish between
18 compensable and non-compensable programs on
19 WGN, right? I know that was convoluted.

20 A. Yeah, can you -- can you rephrase that
21 question. That was a complex question.

22 Q. Fair enough. Fair enough. But the
23 rationale for this special treatment is that,
24 but for the special process, the respondents on
25 WGN-only systems could not distinguish between

1 compensable and non-compensable programming?

2 A. It is to remind the executives who are
3 serving as the respondents about what are
4 compensable and not compensable programs, yes.

5 Q. Well, that's not quite -- you didn't
6 quite answer my question. My question was
7 that, but for this special process, is the
8 rationale that the respondents could not make
9 that distinction between compensable and
10 non-compensable?

11 A. I do not like the use of but-for
12 questions, which are difficult to respond to.
13 I am not saying that executives couldn't know
14 what was compensable, but there's no reason for
15 an executive who is transmitting WGN to have a
16 complete understanding of what are the
17 compensable and non-compensable programs that
18 are being aired.

19 Q. If I understand your testimony
20 correct, it's not required but it helps? Is
21 that a fair way to describe your response?

22 A. Well, clearly in previous
23 considerations and rulings, there was a lot of
24 discussion about compensable programming on WGN
25 and the problem that respondents -- that's --

1 you know, you've been talking about parsing out
2 information. Now you think about these program
3 categories and the WGN-only respondents have to
4 think about, okay, am I thinking about
5 compensable or not compensable?

6 This makes their respondent task
7 easier.

8 Q. Now, there are other systems that
9 carry WGNA plus other distant signals, correct?

10 A. That's correct.

11 Q. And they weren't accorded the same --
12 the same treatment, correct?

13 A. That's correct.

14 Q. And now can we look at -- do you have
15 Mr. Trautman's testimony on you?

16 A. Yes.

17 Q. Let's go to Appendix C.

18 JUDGE STRICKLER: Which testimony?

19 MR. OLANIRAN: Mr. Trautman's
20 testimony, that's Exhibit 1001.

21 JUDGE STRICKLER: His direct?

22 MR. OLANIRAN: The direct, yes.

23 THE WITNESS: The direct?

24 MR. OLANIRAN: Yes. Yes.

25 THE WITNESS: Appendix C, did you say?

1 MR. OLANIRAN: Yes.

2 BY MR. OLANIRAN:

3 Q. Are you there?

4 A. In this copy, it's not clearly marked,
5 but -- Appendix C, but I assume you're looking
6 at the WGNA America 2013 program summary?

7 Q. I was actually looking at 2010.

8 A. I don't have that in this binder.

9 Q. You're not looking at Appendix C-1?

10 A. I don't have something called C-1. It
11 goes -- wait, wait, C-1. Sorry. I have to
12 flip to the back.

13 JUDGE STRICKLER: It doesn't have the
14 word "appendix" on it. It just says C-1.

15 MR. OLANIRAN: I'm sorry.

16 THE WITNESS: I did find a page that
17 said C-1, Appendix C-WGN-only survey
18 instruments. Is that what you're looking at?

19 BY MR. OLANIRAN:

20 Q. That should be it.

21 MR. OLANIRAN: Can I approach, Your
22 Honor?

23 JUDGE BARNETT: You may, yes.

24 JUDGE STRICKLER: It's just --

25 JUDGE BARNETT: There are two page

1 C-1's.

2 THE WITNESS: Yes.

3 JUDGE STRICKLER: That will throw you.

4 JUDGE BARNETT: Judge Strickler's

5 eagle eye figured that one out.

6 BY MR. OLANIRAN:

7 Q. I wish all our other problems could be
8 that easy to solve, right? So let's take a
9 look at question -- Question 2 of -- so we're
10 looking at the 2010 template for the WGNA-only
11 program questionnaire, right?

12 A. Yes, we are.

13 Q. And so in -- if you look at Question
14 2, before the interviewer even asks any
15 question about ranking or valuation, the first
16 paragraph talks about the nature -- nature of
17 the programming, correct, that they want the
18 respondent to focus on, right?

19 A. Are you up at the top of page C-2 --

20 Q. Yes, I am.

21 A. -- where it says "this survey
22 concerns"?

23 Q. Yes.

24 A. Okay.

25 Q. And then the middle paragraph -- this

1 next paragraph focuses the questions on
2 programming on WGNA, right?

3 A. Well, it says that they want to talk
4 about the WGNA programming and they'd like to
5 send them a summary before they do the
6 interview.

7 Q. So, I mean, before they even get to
8 the questions, you have three paragraphs
9 already explaining the programming of interest
10 to the respondent, correct?

11 A. You haven't explained the program
12 categories to them at this point. You've
13 simply said, you know, we're going to be
14 talking about WGNA.

15 Q. Okay. And -- and -- but it does help
16 focus the respondent on what -- the path that
17 the questioning is going to lead in, does it
18 not?

19 A. Certainly, it does, yes.

20 Q. Okay. And so these first three
21 paragraphs, they're geared to elicit
22 information -- makes it clear that they are --
23 that the interviewer is interested in
24 information about compensable programming,
25 right?

1 A. I'm just trying to remember if they
2 use that particular terminology. They
3 certainly don't use the term "compensable," but
4 they are describing the concept to the
5 respondent, yes.

6 Q. Thank you. That's -- and then let's
7 -- let's look at the programming summary that's
8 attached -- the 2010 programming survey, if you
9 will.

10 Are you looking at it?

11 A. I've got it, yes.

12 Q. Okay. And so in the -- in this --
13 this document was provided to the respondent in
14 advance, correct?

15 A. Yes.

16 Q. And then it has program examples, and
17 it has total number of programs, total hours
18 for each program, and the date part summary for
19 the programs. Do you see that?

20 A. Yes.

21 Q. And for the category news and other
22 station-produced programming, the summary
23 identifies very specific shows such as
24 Primetime News, WGN Mid-day News, Cubs, White
25 Sox, and Bulls pre- and post-game shows. Do

1 you see that?

2 A. Yes.

3 Q. And the category for the live team
4 sports, the summary identified very specific
5 sports, Cubs baseball, White Sox baseball, and
6 the Bulls. Do you see that?

7 A. I do.

8 Q. And those teams are clearly playing
9 other teams, presumably, if it's a live -- live
10 team sports, correct?

11 A. Yes, one would hope so.

12 Q. And --

13 JUDGE STRICKLER: Unless it was the
14 Knicks.

15 (Laughter.)

16 BY MR. OLANIRAN:

17 Q. And so this identification of program
18 patterns is sort of consistent if you look at
19 all of the -- all the years' program summaries.
20 I don't know if you had a chance to review this
21 in your -- in your review of the
22 questionnaires.

23 A. I had looked at these program
24 summaries, yes.

25 Q. Okay. And so now for the movie

1 category for 2010, it identifies only feature
2 presentation and feature prime presentation.
3 Now, this is not exactly the same level of
4 detail when compared to the other categories,
5 is it?

6 A. Well, it is akin to, you know, prime
7 news and midday news or akin to, you know, the
8 description of one-time-only specials and
9 special reports.

10 Q. Do news programs have titles other
11 than just news?

12 A. Not that I'm aware of.

13 Q. Okay. And throughout the four years,
14 movies are referred to basically either as just
15 simply movies or I think there was one year
16 that they used the phrase "feature" -- in 2010
17 they used feature presentation, but in other
18 years, I think they also used just the word
19 "movies," right?

20 A. I'd have to go and look at them, but I
21 think you're correct.

22 Q. Okay. And in your mind, just labeling
23 the category as movies is the equivalent of
24 actually identifying White Sox or Cubs baseball
25 or Chicago Bulls basketball?

1 A. You know, I see them as -- as similar
2 because they don't list all of the Cubs'
3 baseball games, the details of those particular
4 games. They -- it's a broad category. One is
5 a feature movie presentation. One is Cubs
6 baseball. I -- you know, they're not listing
7 all of the detailed, you know, exact, you know,
8 Cubs, you know, world series -- well, it wasn't
9 the world series at that point, but, you know,
10 they're not listing, you know, the detail of
11 who they played.

12 Q. So in your view, the respondent
13 equates the -- in your view, in the ears of the
14 respondent, a program category title feature
15 presentation of movies resonates just as well
16 as a program category of sports identifying the
17 major sports franchises that have programs on
18 that -- on their signal?

19 A. I think they're self-explanatory in
20 that, you know, a movie presentation are
21 movies. I mean, they could have listed, you
22 know, all of the movies. I'm not -- with 108
23 hours of programming, that would be a lot to
24 list.

25 The idea here is just to remind the

1 respondent that feature presentations are
2 compensable and need to be considered in their
3 valuations in Question 4.

4 JUDGE STRICKLER: Excuse me,
5 Professor. You say they are self-explanatory,
6 but there are two categories within movies.
7 There's feature prime presentation, and it
8 lists 8.5 hours, and there's feature
9 presentation, which is 108 hours.

10 Do you think "feature prime
11 presentation" is self-explanatory?

12 THE WITNESS: You know, I'm not in
13 this industry, so I assume that it has to do
14 something with the time at which it's on, which
15 is on 7 p.m. on Saturday. So the fact that
16 they've provided the time slots that correspond
17 to these, these presentations, should anchor it
18 for the respondent with respect to what movies
19 they are talking about.

20 JUDGE STRICKLER: So you understand,
21 and with the same caveat I would have, not
22 being in the industry, that prime represents
23 prime time as opposed to a more popular movie.

24 THE WITNESS: Could have. I'm not
25 sure which -- what "prime" refers to here,

1 quite honestly, but I did think when I first
2 saw this that prime, because it was at 7 p.m.
3 Saturday night meant time slot, not, you know,
4 necessarily Academy Award winner.

5 JUDGE STRICKLER: Thank you.

6 BY MR. OLANIRAN:

7 Q. So in your mind, if the program
8 category has simply listed baseball instead of
9 Cubs baseball, would that have made a
10 difference in how the respondents were trying
11 to formulate their response?

12 A. I'm just trying to think if WGNA does
13 any other baseball that isn't either Cubs or
14 White Sox, and I don't know that, so --

15 Q. What if the description had just said
16 basketball without mentioning Bulls?

17 A. Well, once again, I don't know if
18 there are other categories -- I don't know
19 sitting here today if there's other categories
20 of basketball that are transmitted on WGN.

21 Q. Dr. Mathiowetz, I just wanted to get
22 some clarity with respect to your view of the
23 "other sports" category. I think in your
24 testimony you disagree with the creation of the
25 "other sports" category. And if I recall your

1 testimony yesterday correctly, you said you
2 didn't see any justification for it, and one of
3 the factors you mentioned was that it didn't
4 have any air time. Is that correct?

5 A. I think there are two separate points.
6 So, first, no, I didn't see in any of the
7 Program Suppliers experts' justification for --
8 you know, a clear-cut justification for this
9 "other sports" category.

10 And then I think I went to talk about
11 the fact in the Horowitz survey where we see
12 this "other sports" category using examples
13 looking at WGNA plus Public Television, right,
14 when you look at how that category is described
15 to respondents, it's describing that with shows
16 that were not aired on those stations between
17 2010 and 2013.

18 Q. Are you talking about WGN-only
19 stations or WGN plus stations?

20 A. WGN plus stations. That was one of
21 the examples we talked about. And I also did
22 talk about WGN-only.

23 Q. Okay. And what justification would
24 you have had to see to justify the "other
25 sports" category?

1 A. So, you know -- so, first of all, my
2 understanding -- and, you know, I'm new to
3 these proceedings, so maybe my understanding is
4 incorrect, but that there were an agreed-upon
5 set of program categories, right, that have
6 been used traditionally.

7 And those continue to be used, even
8 though for some of them the amount of air time
9 has, you know, significantly decreased in some
10 of those categories over time. So one is kind
11 of the long-established categories.

12 So what would justify bringing in a
13 new category? Well, if you see an entirely
14 different area of programming that wasn't
15 originally represented in these five, six, or
16 seven categories, then that would be
17 justification for including a new category.

18 Q. And so the other sports category --
19 with regard to Mr. Horowitz's survey, the other
20 sports category actually had, relatively
21 speaking, a significant allocation in all four
22 years, correct?

23 A. Well, a significant valuation by the
24 Horowitz respondents, yes, but I already
25 testified that part of that is in part related

1 to the fact that it's misleading and erroneous
2 information in the description of that
3 category.

4 Q. In all instances or in just some?

5 A. I'd have to go back and look. So,
6 once again, here with respect to the
7 identification of the erroneous information,
8 I'm relying on Mr. Trautman's comparisons and
9 his enumeration because, once again, I'm not an
10 industry specialist.

11 My bottom line as a survey
12 methodologist is that if the program category
13 description is erroneous, then you've misled
14 the respondents to think that there's more
15 content in that category than there actually
16 is.

17 Q. Now, are you basing this on just air
18 time?

19 A. No, I'm basing it on the fact that
20 when Mr. Trautman looked at what was actually
21 described as "other sports" and what was
22 actually aired, he identified in his written
23 Rebuttal a litany of erroneous information that
24 was provided to the respondents with respect to
25 the "other sports" category.

1 Q. Can I -- I need to put down what you
2 are describing as erroneous.

3 A. Well --

4 Q. What are you characterizing as
5 erroneous?

6 A. Well, when you say to the respondent,
7 you know, to evaluate a program category that
8 includes figure skating, NASCAR, and I forget
9 what else, and there was no airing of NASCAR or
10 figure skating on that -- on those channels --
11 on that particular distant signal, that is
12 misleading information.

13 Q. Is this including that -- does the
14 question -- does the Horowitz questionnaire say
15 that -- suggest that the program, the program
16 category includes the show or it describes the
17 category and says "such as these shows"?

18 A. I think we have to look because they
19 used both examples that list specific shows as
20 well as "such as," suggesting to the respondent
21 that these are illustrative of the programs
22 that actually did air. And we can look at the
23 specific question wording and document that.

24 Q. Is the questionnaire suggesting
25 programs that did air or suggesting programs

1 that fall within that category?

2 A. The description of the program
3 category includes both.

4 Q. Okay. And with regard to the
5 multi-system respondents and JSC also -- the
6 Bortz survey also has respondents that
7 responded to multiple systems, did they not?

8 A. Right. We looked at that table
9 yesterday.

10 Q. Yes.

11 A. And on average --

12 Q. I understand that. I was here
13 yesterday.

14 A. Okay. Sorry. Don't mean to bore you.

15 Q. So do you understand -- do you know
16 why respondents would have more systems to
17 respond to?

18 A. Yes.

19 Q. Why is that?

20 A. Because -- well, there are two
21 reasons. You want to talk about it with
22 respect to Bortz or with respect to Horowitz?

23 Q. Definitely Bortz.

24 A. Okay. So with respect to Bortz,
25 right, if they start at the cable system, the

1 sampled cable system, and if that person says,
2 Uhm, I'm not responsible for that, you need to
3 go up to, for instance, the regional person,
4 then if that regional executive was responsible
5 for more than one cable system that had been
6 included in the sample, he or she was then
7 reporting for those multiple systems.

8 Q. Okay. Now, on the Horowitz side, how
9 did they approach their screening process?

10 A. They started at the national or
11 regional level and, if they had to, moved down,
12 but started at the national level.

13 Q. Okay. With regard to your
14 understanding of the cable industry, just in
15 general, would you say that over the -- over
16 the last at least five to ten years there has
17 been more consolidation in the -- of cable
18 systems or not?

19 MR. LAANE: Objection, Your Honor, the
20 witness has already testified she is not an
21 expert in the cable industry.

22 JUDGE BARNETT: Sustained.

23 MR. OLANIRAN: I have no further
24 questions, Your Honor. Thank you,
25 Dr. Mathiowetz.

1 THE WITNESS: Thank you.

2 JUDGE BARNETT: Thank you,

3 Mr. Olaniran.

4 Mr. Cosentino, how much questioning do
5 you have?

6 MR. COSENTINO: Ten, 15 minutes.

7 JUDGE BARNETT: We're going to power
8 through then before we take our break. It's
9 just the temperature is going up in here. Feel
10 free to take your jackets off. Do not suffer
11 here. There's no point.

12 THE WITNESS: You've placed the burden
13 on him between all of these people and the
14 break.

15 (Laughter.)

16 JUDGE BARNETT: A method to my
17 madness.

18 MR. COSENTINO: I'm going to take
19 eight minutes.

20 CROSS-EXAMINATION

21 BY MR. COSENTINO:

22 Q. Good afternoon, Dr. Mathiowetz. I'm
23 Victor Cosentino for the Canadian Claimants.

24 A. Good afternoon.

25 Q. I think this morning you touched on

1 the issue of a pilot study in 2009 for the
2 Bortz survey; is that correct?

3 A. Yes.

4 Q. Did you review that pilot study?

5 A. I -- I did not review that
6 questionnaire. I only know that they did
7 conduct that pilot study.

8 Q. Okay. Can you explain what a pilot
9 study is?

10 A. So when you're making changes to a
11 questionnaire, it's often helpful to take that
12 for a test drive, so to speak, to see if
13 respondents understand it, to see if there are
14 problems in the administration of that
15 questionnaire.

16 Q. Is a pilot study the same as
17 pre-testing?

18 A. A pilot study is a particular type of
19 pretest in which it's more like a dry run of
20 the questionnaire rather than other types of
21 pre-testing.

22 Q. When you say other types of
23 pre-testing, what do you mean?

24 A. So there is a whole cadre of
25 activities that we as survey researchers use

1 with respect to pre-testing a questionnaire.
2 Usually, when it's the first time you're
3 putting a questionnaire together, there are
4 things called cognitive interviews. You might
5 run focus groups. You might debrief
6 respondents. So there's -- there's a whole
7 bunch -- a number of different methods.

8 Q. Is the goal to make sure that the
9 respondents understand the questions being
10 posed?

11 A. Yes.

12 Q. Are you aware of whether any type of
13 focus groups or exit interviews or any of that
14 type of things were done in the 2009 pilot
15 studies?

16 A. Well, we don't want to call them exit
17 interviews.

18 Q. I'm sorry.

19 A. That's a whole other work. We don't
20 want to open that can of worms.

21 Q. Okay.

22 A. You know, my understanding is that,
23 no, that they redrafted. I wasn't privy to all
24 of the things that led up to that pilot test.

25 Q. Okay. In questionnaire design, is it

1 important to -- would you acknowledge that this
2 is a fairly complex question, Question 4?

3 A. It is a complex question, but it
4 certainly is one that has been fielded -- a
5 question similar to it has been fielded for 20
6 or 30 years.

7 Q. Okay. But if you were making changes
8 to it, would you engage in some type of
9 pre-testing?

10 A. Do you mean apart from a pilot test?

11 Q. Yes, apart from a pilot test.

12 A. It would depend on how significant the
13 changes were to the wording that had been used
14 in the previous administration.

15 Q. Okay.

16 JUDGE STRICKLER: Excuse me,
17 Professor. You say that although it's a
18 complex question, Question 4, it has been used
19 for 20 or 30 years.

20 Are you making reference back to
21 previous Bortz survey iterations?

22 THE WITNESS: Yes, I am.

23 JUDGE STRICKLER: Have you seen this
24 level of complexity in other survey questions,
25 other than in the Bortz survey?

1 THE WITNESS: You mean apart from
2 these hearings?

3 JUDGE STRICKLER: Yes.

4 THE WITNESS: Oh, yes. This is
5 nowhere near as complex as some of the
6 questions that I've seen.

7 JUDGE STRICKLER: Thank you.

8 BY MR. COSENTINO:

9 Q. Okay. Also -- and I want to jump now
10 to your earlier testimony regarding the Ford
11 Ringold study. And you indicated that small
12 sample sizes in the Ford Ringold study rendered
13 the results unreliable; is that right?

14 A. Right. And they're -- now we're
15 referring to the discussion I had with Mr. Cho
16 with respect to unreliable. That is they
17 have -- you know, it is a small sample, by
18 definition, so it has large confidence
19 intervals around each of those point estimates.

20 Q. Okay. And that's one of the things I
21 wanted to clarify, was which meaning of
22 "unreliable," okay. And it has to do with the
23 wide range of the confidence intervals?

24 A. Correct.

25 Q. All right. And why does small sample

1 sizes lead to that type of unreliability?

2 A. Should we put the formula up for
3 computing variance? So variance takes into --
4 is the square root of PQ divided by N, where N
5 is the sample size. So the smaller the sample
6 size, the larger this number that you're taking
7 the square root of.

8 So when you have a large sample size,
9 right, that number begins to get small, all
10 other things being equal in the design of the
11 survey.

12 Q. Okay. And is that also the case,
13 though, if your universe is small? Do you have
14 wide confidence intervals if you're starting
15 with a small universe?

16 A. Standard errors in confidence
17 intervals come from having -- from -- from
18 sample estimates, not from taking a census.
19 When you start to take a complete census and
20 you have 100 percent response rate, you don't
21 generate confidence intervals because
22 confidence intervals have to do with being able
23 to draw inferences from a sample to the
24 population of interest.

25 Even if you have -- if you have --

1 start out with a small universe, then your
2 sample is going to be small by definition.

3 Q. If you try and question the entire
4 universe and you don't get 100 percent, do you
5 have to treat it as a sample?

6 A. Oh, this is really ambiguous in the
7 literature. So a census is only a census if
8 you take and interview all 100 percent.

9 Q. Okay. But if you're studying a
10 population and you attempt to get 100 percent
11 of the population and then you don't, does that
12 convert your study to a sample or is it still a
13 -- are we still talking about a population
14 where you're not worried about confidence
15 intervals?

16 A. Once you fall back from 100 percent
17 census, you're making inferences from whatever
18 data you have collected to that larger
19 population. And because you don't have
20 observations on every one, you have to express
21 some degree of uncertainty, typically expressed
22 in confidence intervals.

23 JUDGE STRICKLER: Is that a random
24 sample any longer, if you're seeking to do a
25 census and then you only get 90 percent

1 response? That's not a random sample anymore,
2 is it?

3 THE WITNESS: No, it isn't.

4 JUDGE STRICKLER: How do you do
5 confidence intervals with that?

6 THE WITNESS: This is -- we're falling
7 into the world that appears in no statistics
8 books, so, you know, everything that we see
9 with respect to statistical inference is based
10 on the assumption of a simple random sample.

11 JUDGE STRICKLER: Is that where you
12 would then do bootstrapping or something like
13 that out of the --

14 THE WITNESS: Right.

15 JUDGE STRICKLER: -- out of the 90
16 percent to come up with something that has some
17 sort of statistical probability?

18 THE WITNESS: Right. So what you need
19 to do when you're in that world of you've tried
20 to get 100 percent but you didn't get it, but
21 you didn't draw a random sample, is you're
22 trying to convey to your readers that you don't
23 have a point estimate that has observation on
24 everyone.

25 So bootstrapping is one approach that

1 people do to try to provide some -- some
2 suggestion of the variability around a point
3 estimate from this imperfect census.

4 JUDGE STRICKLER: Thank you.

5 BY MR. COSENTINO:

6 Q. So in your report, you -- when you
7 talk about the unreliability on this issue of
8 Ford Ringold because of a small sample size,
9 you said -- you say unlike Bortz. Now, would
10 you consider Bortz to have a large sample?

11 A. Bortz does have observations on 100 to
12 200 cases per year. So, yes, it begins to --
13 it definitely has a much larger sample size.

14 Q. Okay. And within that sample,
15 Canadian signals appear only a handful of
16 times, let's say 15 or less.

17 A. Right.

18 Q. Does that affect the confidence
19 intervals around the Canadian valuation
20 reports?

21 A. Yes. So you have -- you don't have a
22 lot of observations within Bortz around those
23 Canadian -- the valuations of those Canadian
24 signals.

25 Q. Okay. And does that affect the

1 reliability then of Bortz with regard to the
2 valuation of the Canadian signals?

3 A. Yes.

4 MR. COSENTINO: Thank you. I have no
5 further questions.

6 THE WITNESS: You did come in under
7 eight minutes.

8 (Laughter.)

9 MR. COSENTINO: I have to be very
10 careful with my time.

11 JUDGE BARNETT: Thank you,
12 Mr. Cosentino.

13 MR. LAANE: Your Honor, I am going to
14 have a few questions. I don't know -- I'm
15 happy to do them after the break. I just
16 didn't want to get lost in the shuffle.

17 JUDGE BARNETT: A few?

18 MR. LAANE: Yes, Your Honor.

19 JUDGE BARNETT: Can you estimate a
20 time?

21 MR. LAANE: Five to ten minutes.

22 JUDGE STRICKLER: Just for the
23 questions or the questions and the answers?

24 (Laughter.)

25 MR. LAANE: Depends on the witness,

1 Your Honor.

2 JUDGE STRICKLER: It always does. You
3 never know how you're able to estimate an
4 examination when you don't know how much time
5 the witness is going to spend answering.

6 JUDGE BARNETT: If we go ahead, then
7 we can excuse Professor Mathiowetz. Is that
8 correct?

9 MR. LAANE: Yes.

10 JUDGE BARNETT: Yes. Then let's do
11 that.

12 THE WITNESS: Thank you.

13 REDIRECT EXAMINATION

14 BY MR. LAANE:

15 Q. Good afternoon, Your Honors,
16 Dr. Mathiowetz, and I will try to be quick
17 about this. First, if you could --

18 A. And I will too.

19 Q. First, if you could turn to your
20 written Rebuttal testimony and let's look at
21 page 28. And you were asked by Mr. Cho about
22 adjusting Dr. Frankel's estimates. Am I
23 correct that really what you did with
24 Dr. Frankel's estimates was he had reported
25 standard errors, and to get an

1 apples-to-apples, you converted those into
2 confidence intervals?

3 A. That's correct. I have done no new
4 computations. I've just made sure that,
5 because Bortz had produced confidence
6 intervals, that we could look at Dr. Frankel's
7 estimates as confidence intervals rather than
8 standard errors.

9 Q. Okay. And did you or did you not do
10 an adjustment in there for the issue of
11 independence that you were discussing with
12 Mr. Cho?

13 A. I did not. I took at face value
14 Dr. Frankel's standard errors and just made --
15 turned them into confidence -- 95 percent
16 confidence intervals.

17 Q. And did Dr. Frankel or Mr. Horowitz do
18 any adjustment for the independence issue?

19 A. Not to my knowledge, no.

20 Q. Okay. You haven't seen anything to
21 that effect in the record?

22 A. No, I have not.

23 Q. Okay. Now, you mentioned to Mr. Cho
24 that the relative impact of the independence
25 issue was different for Bortz and for Horowitz.

1 Can you explain that for us?

2 A. Well, if we remember back to yesterday
3 afternoon when we looked at the mean number of
4 cable systems that each respondent was
5 responding for, we think of those as -- I'll
6 refer to those as clusters, right?

7 The average cluster size in Bortz is
8 2.2 cable systems that each executive is
9 reporting for. If we think about the Horowitz,
10 we go back to those numbers, the average -- the
11 cluster size was about, I think, 8 or 9, if I
12 remember correctly from that slide.

13 So what you see is that cluster size
14 -- when you compute standard errors, taking
15 into account cluster size, the size of the
16 cluster is what drives up and inflates the
17 standard error. So it's almost as if it's --
18 once again, it's a formula we could go into,
19 but you inflate the standard error estimates
20 that we see in either Bortz or Horowitz by a
21 product of the average cluster size and value
22 called the inner correlation coefficient.

23 So cluster size, you know, we know
24 here the cluster size. Given that the cluster
25 size for Horowitz is four times that of that we

1 see in Bortz, we can make some pretty clear-cut
2 assumptions that the impact on the standard
3 errors is going to be about four times as large
4 for Horowitz than for Bortz.

5 Q. Okay. So what does that mean for the
6 Judges if and when they are assessing the
7 utility of the Bortz confidence intervals and
8 the Horowitz confidence intervals?

9 A. It means that had that adjustment
10 taken place for Bortz, you'd see a somewhat
11 larger confidence interval, and for the
12 Horowitz estimates produced by Dr. Frankel, you
13 would see significantly larger confidence
14 intervals. They would be much, much wider.

15 Q. Jeff, could you give me the ELMO for a
16 moment, please.

17 You were asked by Mr. Olaniran about
18 the reference guide and "don't know" options.
19 I just wanted to ask you about another quote
20 from page 391 of the reference guide. "Recent
21 research on the effects of including a 'don't
22 know' option shows that quasi-filters as well
23 as full filters may discourage a respondent who
24 would be able to provide a meaningful answer
25 from expressing it."

1 Can you explain what this means?

2 A. So this is exactly what I was alluding
3 to when I was providing my answer, that when
4 you give an explicit "don't know," respondents
5 say: Oh, there's an easy way out of this task.
6 I'm going to say "don't know."

7 And so they might have been quite
8 capable of answering, but because you've
9 explicitly offered them this approach, they
10 take it.

11 JUDGE STRICKLER: It says on that same
12 sheet that one solution is to instruct the
13 respondents to not guess. Was that included in
14 the Bortz survey?

15 THE WITNESS: I -- I do not believe
16 there's any specific instruction with respect
17 to guessing or not guessing.

18 JUDGE STRICKLER: Thank you.

19 BY MR. LAANE:

20 Q. You were asked about your review of
21 prior -- of testimony from prior proceedings on
22 the constant sum survey being an established
23 and appropriate methodology for the Bortz
24 survey.

25 Can you tell us whether or not that

1 remains true as of today, that the constant sum
2 survey is an accepted and appropriate
3 methodology for the survey?

4 A. Yes. And the only reason I cited to
5 that literature is that literature or those
6 citations were in the record with respect to
7 the constant sum use in these particular
8 hearings. There certainly are robust empirical
9 literature that has data on the use of constant
10 sum questions in, you know, 2000 through 2017.

11 Q. Thank you.

12 MR. LAANE: I have nothing further.

13 JUDGE BARNETT: Any questions from the
14 bench? Okay. Thank you. We will be at recess
15 for 15 minutes. Recess for 15 minutes.

16 And thank you, Professor Mathiowetz.
17 You may be excused.

18 THE WITNESS: Thank you.

19 (A recess was taken at 2:40 p.m.,
20 after which the trial resumed at 3:03 p.m.)

21 JUDGE BARNETT: Good afternoon. All
22 but the witness please be seated.
23 Whereupon--

24 MARCI BURDICK,
25 having been first duly sworn, was examined and

Proof of Delivery

I hereby certify that on Friday, March 22, 2019 I provided a true and correct copy of the (PUBLIC) Written Direct Statement of the Settling Devotional Claimants - Volume IV to the following:

American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), represented by Joseph DiMona served via Electronic Service at jdimona@bmi.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@yahoo.com

Spanish Language Producers, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Joint Sports Claimants (JSC), represented by Robert Garrett served via Email

SESAC, Inc., represented by John C. Beiter served via Electronic Service at jbeiter@lsglegal.com

Motion Picture Association of America (MPAA)-Represented Program Suppliers, represented by Alesha M. Dominique served via Email

National Public Radio, Inc. (NPR) (submitted comment), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

American Society of Composers, Authors and Publishers, represented by Samuel Mosenkis served via Email

MPAA-represented Program Suppliers, represented by Gregory O Olaniran served via Electronic Service at goo@msk.com

Joint Sports Claimants, represented by Michael E Kientzle served via Electronic Service at michael.kientzle@apks.com

Settling Devotional Claimants, represented by Jeannette M. Carmadella served via Email

Broadcast Music, Inc., represented by Janet Fries served via Email

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Major League Soccer, LLC, represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Broadcaster Claimants Group, represented by John Stewart served via Electronic Service at jstewart@crowell.com

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss served via Electronic Service at jennifer.criss@dbr.com

Spanish Language Producers (SLP), represented by Brian Boydston served via Email

Signed: /s/ Matthew J MacLean